IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2022

CORAM:

THE HON'BLE DR. JUSTICE ANITA SUMANTH

WP.Nos.26534, 26539, 26544, 26549 and 35048 of 2019

and WMP.Nos.35826 & 35828 of 2019

1. Quanta Logistics Private Limited
No.6, II Floor,
MA Chidambaram Building, Esplanade,
Chennai-600 001
Rep. by its Authorised Signatory
K.G.Mohan Varma

2. Ben Line Agencies (India) Private Limited,
No.6, II Floor,
MA Chidambaram Building, Esplanade,
Chennai-600 001
Rep. by its Authorised Signatory
S.Paul Anand … Petitioners

Vs.

1. The Board of Trustees,
Chennai Port Trust,
Administrative Office,
Rajaji Salai, Chennai-600 001.
Rep. by its Chairman.

2. The Traffic Manager,
Traffic Department, (Commercial),
Chennai Port Trust,
Rajaji Salai, Chennai-600 001.

3. The Financial Advisor and Chief Accounts Officer,
Chennai Port Trust,
Rajaji Salai, Chennai-600 001.

4. Tariff Authority for Major Ports (TAMP),
4th Floor, Bhandar Bhavan, M.P. Road,
Mazgaon, Mumbai 400 010
Rep. by its Director. … Respondents

Prayer in WP.No.26534 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of writ of Certiorarified Mandamus, to call for the records of the 1st Respondent leading to the issuance of the impugned demand letter bearing No.GL/37/2019/TC dated 28.05.2019 towards the wharfage charges, quash the same and consequently, direct the 1st Respondent to refund the sum of Rs.2,86,50,319/- to the 2nd petitioner, together with interest at 18% p.a.

Prayer in WP.No.26539 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of writ of Certiorarified Mandamus, to call for the records of the 1st Respondent leading to the issuance of the impugned demand letter bearing No.GL/37/2019/TC dated 28.05.2019 towards the wharfage charges, quash the same and consequently, direct the 1st Respondent to refund the sum of Rs.7,29,599/- to the 2nd petitioner, together with interest at 18% p.a.

Prayer in WP.No.26544 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of writ of Certiorarified Mandamus, to call for the records of the 1st Respondent leading to the issuance of the impugned demand letter bearing No.GL/37/2019/TC dated 28.05.2019 towards the wharfage charges, quash the same and consequently, direct the 1st Respondent to refund the sum of Rs.1,72,177/- to the 2nd petitioner, together with interest at 18% p.a.

Prayer in WP.No.26549 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of writ of Certiorari, to call for the records of the 1st Respondent leading to the issuance of the letter dated 26.07.2019 bearing No.GL/037/2019/TC, to the 2nd petitioner and quash the same.
Prayer in WP.No.35048 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of writ of Certiorari, to call for the records of the 4th Respondent leading to the issuance of the impugned order No.TAMP/29/2015-CHPT dated 15.05.2015, quash the same.

(In all WPs)
For Petitioners : Mr.P.Giridharan

For Respondents : Mr.P.M.Subramanian (for R1 to R3)

Mr.S.HajaMohideenGisthi (for R4)
Additional Central Government Standing Counsel

COMMON ORDER

The petitioners have filed these four writ petitions, praying for differing though connected reliefs. In WP.No.35048 of 2019, petitioners pray for a quash of the order of the Tariff Authority for Major Ports (TAMP) dated 15.05.2015, in WP.No.26549 of 2019, the challenge is to an order of the first respondent, the Chennai Port Trust (Port Trust/CPT) levying wharfage charges and in WP.Nos.26534 & 26539 of 2019the prayer is for refund of the wharfage charges paid by the petitioners under protest to CPT.

2.The first petitioner, Quanta Logistics, is an importer of a cable repair vessel (MV ASEAN RESTORER) (Vessel), and had engaged the 2nd petitioner,Ben Line Agencies (India) Private Limited, as steamer agent for the vessel. The vessel is specifically equipped to engage in repair and restoration of submerged fibre optic cables that lie in the ocean and sea beds. The vessel carries on board consumable cable jointing equipment, along with accessories and a complete Remotely Operated Underwater Vehicle (ROV) system of cable ship that is used for cable repair.

3.The vessel sailed from the Port of galle arriving at the Chennai Port on 22.05.2019, berthing, conversion to coastal run and necessary clearances before proceeding to the project site to carry out cable repair work and for maintenance of the Bay of Bengal Gateway Submarine cable system fault repair near the coast of Chennai. Import General Manifest (IGM) declaration was filed and for customs purposes, the 2nd petitioner declared the vessel as 'cargo'.The question that arises in this writ petition is as to the classification of the vessel for the purposes of determining its liability to pay wharfage charges.

4. The petitioners argue that upon arrival of the vessel at the specified locations, the entirety of the repair and maintenance work for which it has been imported is carried out from on board the vessel itself. None of the equipments or cable on board the vessels would be unloaded or discharged from it. After having carried out the repair, the equipments are retracted back into the vessel and the ship leaves to its next destination.

5. The vessel is merely temporarily imported for the duration of the repair/maintenance work to be carried out within Indian territorial waters. All parties before me concur upon the nature of work executed and upon the position that no part of the vessel or the equipment on board the vessel was actually unloaded upon the wharf. Thus, and since there was no use of the

wharfage facility, the question of remittance of wharfage does not arise.

6.The stand of the Port Trust is to the contrary as the vessel had been manifested as 'cargo' for the purpose of customs. CPT relies upon the CPT scale of rates effective 01.10.2014 as approved by TAMP, to the effect that wharfage is to be remitted on all manifested cargo.

7.CPT had approached TAMP seeking a clarification in regard to the levy of wharfage on a vessel based upon its manifestation as cargo either in the IGM/EGM. The specific clarification sought is extracted below:

> (a) whether the Chennai Port can continue to treat the vessel as a cargo if it is manifested as a cargo either in the import General Manifest or Export General Manifest filed with Customs and levy wharfage considering the definition of wharfage in the existing Scale of Rates.
>
> (b) whether the Chennai Port should not treat the vessel as cargo even if it is manifested as a cargo either in the Import General Manifest or Export General Manifest treating the vessel as conveyance.

8.TAMP had initially passed an order on 25.03.2015 that the classification for the purpose of Customs Act, 1962 as 'cargo' would not be relevant and such vessel, such as the one in question,that does not utilize wharfage facility and which has not been unloaded upon the wharf, should be treated as 'conveyance' only. In stating thus, they relied upon the legal opinion obtained by them.

9.It appears that CPT once again reiterated its request on 18.04.2015 raising the same two points for clarification as had been raised in the original query dated 14.01.2015. To reiterate, CPT asked whether a vessel, declared as cargo in the IGM/EGM, should be treated as cargo, also for the purposes of wharfage, or whether the nature of their engagement and activity be taken note of to determine their liability to wharfage.

10. Inter alia, CPT also queried whether such determination would be applicable only for the first voyage of the vessel. This last aspect does not appear to have been part of CPT's queries dated 14.01.2015 and appears to be inspired by the Rules for levy of wharfage by other Port Trusts.

11.In response to the reiterated queries of CPT, impugned notification dated 15.05.2015 has come to be issued by TAMP succumbing to the suggestion of CPT that such vessel, on its first voyage alone, shall be declared as conveyance, but shall be treated as cargo on all further trips. The conclusion is at para-4.1 of the impugned order of the TAMP dated 15.05.2015 and reads as follows:

> 4.1 Based on the legal opinion, this Authority is inclined to approve insertion of the following as Note no.(1) after the existing Note No (9) under Scale-1 – Wharfage of Chapter-III – Cargo Related Charges, as proposed by the CHPT:
>
> "(10) Vessels calling the Port on her first voyage, which are declared as cargo in the import General Manifest or Export General Manifest for the purposes of Customs Act, 1962, shall not be treated as cargo and no wharfage shall be levied on such vessels, if the vessels come into the port on their own steam and sail out of the port limits on their own steam. However, when loading or unloading of vessels takes place within the Port limits, wharfage as per Scale-1 above shall be payable on such vessels."
>
> 4.2 With regard to the date of effect of the amendment proposed by it, it is to state that the Order of this Authority generally takes effect prospectively after expiry of 30 days from the date of Gazette Notification unless otherwise different arrangement is specifically mentioned in the respective tariff Orders. In exceptional cases retrospective effect is given for reasons to be recorded. It is noteworthy that the CHPT has mooted the proposal in reference based on the clarification given vide letter dated 25 March 2015. Since a clarification has already been given on 25 March 2015, it is felt appropriate to give effect to the proposed amendment with effect from 25 March 2015 (being the date when the clarification has been furnished to CHPT).

12. Since the vessel had already been treated as 'conveyance' in its first voyage, it was treated as 'cargo' for all subsequent voyages. The petitioner remitted the wharfage under protest and claims refund of the same in two of the writ petitions being disposed under this order.

13.The petitioner argues that a vessel carrying out maintenance and repair of undersea cables admittedly do not discharge or unload cargo at the wharf. The required apparatus is attached to the interior of the ship and the entire assignment is carried out from on board the ship from various locations in the sea. The facility of wharfage facility does not come into the picture and plays no role in such a scenario.

14.That apart, the petitioner also points out that in its original opinion on 25.03.2015, TAMP had taken a considered view and there has been no material produced thereafter by CPT warranting a change in stand of TAMP. My attention is also drawn to proceedings issued by other Ports that have taken a stand in line with that prayed for by the petitioner, to the effect that such a vessel will only be treated as 'conveyance' and not as 'cargo'.

15.Heard detailed submissions of Mr.P.Giridharan, learned counsel for the petitioner, Mr.P.Subramanian, learned counsel for R1 to R3and Mr.HajaMohideenGisthi, learned Additional Central Government Standing Counsel for R4.

16.The issues that arise for attention and resolution are:

(i)whether the classification of a vessel for the purposes of the Customs Act and in the IGM/EGM would be binding as regards the levy of wharfage?

(ii)whether the abrupt change in opinion by TAMP between its letter dated 25.03.2015 and 15.05.2015 is valid in law or based upon any material warranting such a change in stance?

(iii)whether the classification of the vessel engaged in maintenance/repair work in under Sea cable should be 'cargo' or 'conveyance' for the purpose of levy of wharfage?

17.The facts are more or less admitted and as set out in the preceding paragraphs. The initial opinion of TAMP as per letter dated 25.03.2015 is based upon the legal opinion obtained by it and the counter filed by TAMP is categorical to the effect that the vessel in question/vessels engaged in similar activity,would only be classifiable as 'conveyance' and not 'cargo'.

18. To this end, the relevant paragraphs in the counter are illuminating. The legal opinion furnished by the counsel of TAMP that has been reproduced in full in the counter and based upon which initial opinion dated 25.03.2015 was issued, is as below:

> 8.In this regard, the Learned Advocate furnished his written legal opinion vide his e-mail dated 17 March 2015. The Legal Opinion received from the Advocate is reproduced below:
>
> ……….
>
> (xviii) In my view, filing of Customs documentation, for the purposes of compliance of provisions of that Act, will not and does not give a right to the Major Ports to levy and charge wharfage

on such vessels that are being imported and/ or exported, but coming / going on its own steam as conveyance, as defined under the Major Port Trusts ct, 1963.

(xix) It is a completely different issue when a vessel carries another vessel as cargo for discharging in the Port, either on the quay, jetty or foreshore (wharf), or loads another vessel as cargo on board itself from such wharf of the Port. In such cases, such loaded or unloaded vessels are 'cargo', on which cargo related charges including 'wharfage' are leviable.

(xx) In the case as mentioned in the CHPT letter, the same is not a case where the vessel is a cargo being landed / unloaded; but, a conveyance, which had come into and / or left the Port on its own steam as conveyance, for which vessel-related charges alone would be applicable.

(xxi) The Dictionary of Shipping Terms, 5th Edition, by Peter Brodi, defines 'cargo' to mean "goods carried in or on a ship", and wharf is defined generally as "a structure built alongside the water where ships berth for loading and / or discharging goods; and wharfage is "charges payable for the use of a wharf".

(xxii) The above definition fortifies the view that if the vessel (cargo) is not carried on board another vessel (conveyance), then wharfage is not leviable on such vessels.

(xxiii) Position under the Customs Act, and matters to be done thereunder, is quite distinct from matters under the Major Port Trusts Act.

(xxiv) In the premises, I have no hesitation in opining that vessels which call at the Major Ports, for which IGMs and or EGMs are filled for the purposes of the Customs Act, 1962, cannot be treated as 'cargo'; and they are conveyance only; and Major Ports should not charge wharfage on such vessels.

(xxv) In relation to the query under consideration, such vessels are conveyance, and not cargo."

19.It is on the basis of the aforesaid opinion that the initial view was taken by TAMP. Wharfage under the Scale of Rates, particularly Chapter I, Class 1.1(vi), is defined as ‘basic dues recoverable on all cargo imported or exported or trans, shift or passing through the Port, whether porterage by the CPT or not’. The Scale of Rates stipulating the schedule of wharfage charges does not contain a separate Entry for ‘vessel’ and thus would fall under the residuary class, being Entry 36-A, reading ‘Item not otherwise specific-other than bulk’.In such cases, the wharfage is collected on ad valorem basis.

20.There appears to have been several instances wherein vessels have entered the Port in very similar situations as the vessel in question, seeking either waiver of wharfage or deferment of the charges. These instances are outlined in the counter of TAMP. At para-22 of the counter, TAMP, in fact, reiterates its initial opinion issued under letter dated 25.03.2015 that vessels calling upon the CPT, such as the vessel in question, would only constitute ‘conveyance’.

21. However, CPT, undaunted by the first opinion of TAMP, merely reiterated its request putting forth an alternate proposal as a via media, that the first voyage of such a vessel be treated as ‘conveyance’, but all subsequent voyages, as ‘cargo’. Perhaps left with no option, TAMP has proceeded to issue impugned letter dated 15.05.2015, though contrary to the legal opinion relied upon the TAMP at the original instance. Notable, no justification is given by TAMP for this U-turn in its stance.

22.Learned counsel for TAMP relies upon two decisions of this Court, firstly, in the case of Alcatel Submarine Networks, UK Ltd. Vs. The Union of India and Others, W.P.No.15248 of 2019 decision dated 25.04.2019 and secondly, Global United Shipping India Private Limited Vs. Traffic Manager W.P.No.12813 of 2014 decision dated 20.12.2019.

23.These decisions are of no assistance to the respondents since in the first case, the impugned order has been passed prior to issuance of the impugned letter of TAMP dated 15.05.2015. The second case is also distinguishable in the light of the specific finding of the learned Single Judge in that case to the effect that the claim of refund made by the petitioner was barred by limitation. Limitation is not the defence put up by the respondents in the present case.

24.Coming to the legal issues identified for resolution, I would hold the first issue in favour of the petitioner. Clearly, the qualification/status of the vessel for the purposes of the Customs Act, 1962 would not be relevant to decide the question of liability for wharfage. The definition of wharfage involves certain positive actions to be carried out by the incoming / outgoing vessel. In a case where the infrastructure of the wharf is not utilized by the vessel and there is no loading /unloading of the content of the vessel on to the wharf itself, the mere categorization of a vessel as 'cargo' for the purposes of IGM/EGM would not render it 'cargo' for the purposes of levy of wharfage.

25.This question has been categorically and rightly answered in the legal opinion of the advocate upon which reliance is placed by TAMP in its counter, as noticed above. This question is answered accordingly.

26.As far as the second issue is concerned, in relation to whether there was any justification for TAMP to have reviewed its own opinion, the necessity for review would arise had there been any material placed before the Authority to indicate that the original view taken by the authority has lost sight of relevant material or was patently incorrect.

27.In this case, nothing has transpired between 25.03.2015 and 16.05.2015, except insistence of CPT, to persuade TAMP to review its original view. Mere reiteration by the querist, that is, CPT, ought not to have weighed with TAMP such that it succumbed to its opinion, reviewing its original opinion dated 25.03.2015.

28.Some of the major ports, including Bombay, appear to have taken a view in line with the view taken by TAMP under its impugned letter. However, there are also contra opinions taken by other Port Trusts such as the Visakhapatnam Port Trust, that has taken a categoric view to the effect that vessels calling into the port cannot be treated as 'cargo' merely since the IGM/EGM for the purpose of Customs Act state so. Such vessels must treated as conveyance only and are not liable to wharfage.

29.The scale of rates issued under Gazette No.494 dated 27.12.2019 of the Visakhapatnam Port Trust states as much in Clause (vii) thereof. I would thus answer question 2 also in favour of the petitioner to state that it was not appropriate for TAMP to have adopted the view suggested by CPT merely for the asking. The deviation in stand between 25.03.2015 and 16.05.2015 is wholly opaque and unexplained and a considered view ought to have taken by it, that would be uniform and consistent in regard to all Ports in the country.

30.This would bring me to issue no.3 which must, in my view, be answered only by the appropriate authorities. Issue no.3 deals with appropriateness or otherwise of levy of wharfage for subsequent voyages where the first voyage of the vessels is alone treated as conveyance. I am of the considered view that this Court will not be the appropriate authority to decide this issue, seeing as it involves several technical issues.

31.It appears, at first blush and prima facie, that once a vessel is categorized as conveyance, based upon the position that classification for IGM/EGM under the Customs Act is irrelevant to decide its status for wharfage, then such status must continue for subsequent voyages as well, the nature of its activity and its modus operandi remaining consistent over the first and subsequent voyages.

32.Let TAMP in consultation with CPC as well as other Port Trusts take a consist and considered view in the matter so that the issue is put to rest in a uniform manner as applicable to all Ports in the country within a period of sixteen (16) weeks from today. Till such time a uniform view is taken, the view of TAMP, as put forth in its letter dated 25.03.2015 shall prevail. The impugned letter dated 16.05.2015 is set aside as constituting a review without any justification for the same. The refund, as sought for by the petitioner, shall be processed and paid over, also within a period of 16 weeks from today, subject to the final view to be taken by TAMP in consultation with the Port Trust as aforesaid.

33.These writ petitions are decided and disposed accordingly. Connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

vs/ska

To

1. The Chairman,
The Board of Trustees,
Chennai Port Trust,
Administrative Office,
Rajaji Salai, Chennai-600 001.

2.The Traffic Manager,
Traffic Department, (Commercial),
Chennai Port Trust,
Rajaji Salai, Chennai-600 001.

3.The Financial Advisor and Chief Accounts Officer,
Chennai Port Trust,
Rajaji Salai, Chennai-600 001.

4. The Director,
Tariff Authority for Major Ports (TAMP),
4^{th} Floor, Bhandar Bhavan, M.P. Road,
Mazgaon, Mumbai 400 010.

+5ccs to Mr.P.Giridharan, Advocate SR.No.16439 & 16737

+2ccs to Mr.P.M.Subramanian, Advocate SR.No.16171 & 16172

WP.Nos.26534, 26539, 26544, 26549 and 35048 of 2019

and WMP.Nos.35826 & 35828 of 2019

PA(CO)
GMY(06/04/2022)