



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	18.11.2021
PRONOUNCED ON	13.06.2022

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.NOS.23755 AND 23756 OF OF 2017

AND

W.M.P.NO.24970 OF 2017

M/s.Sherisha Technologies Pvt. Ltd.,
Represented by its Authorized Signatory,
No.67, Bazullah Road,
T.Nagar,
Chennai - 600 017.

... Petitioner in both W.Ps.

Vs.

1. The Chief Commissioner of Customs,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.
2. The Additional Commissioner of Customs,
Group-II,
No.60, Rajaji Salai,
Chennai - 600 001.
3. The Deputy Commissioner of Customs,
Group-II,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.
4. M/s.Continental Warehousing Corporation,
(Nava Sheva),
Madhavaram,
Chennai - 600 110.
5. M/s.Sanco Trans Ltd.,
#592, Ennore Express High Road,
Chennai - 600 057.

... Respondents in both W.Ps.



Prayer in W.P.No.23755 of 2017: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Declaration declaring the impugned communication dated 23.12.2016 in F.No:S.Misc.895/2016-Group-2 issued by the third respondent to the fourth and fifth respondents, as illegal, without jurisdiction, against the provisions of the Act, and null and void.

Prayer in W.P.No.23756 of 2017: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus directing the third respondent to issue the Detention Certificate and other appropriate directions to the concerned Authorities to enable the petitioner to comply with the Order-in-Original dated 05.01.2016 bearing No.43805/2016 by re-exporting the subject consignment to its originating country.

For Petitioner : Mr.V.P.Raman
(in both W.Ps.)

For Respondents :
For R1 to R3 : Mr.V.Sundareswaran
(in both W.Ps.) Senior Standing Counsel

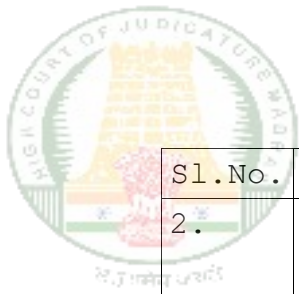
For R4 & R5 : Dr.R.Sunitha Sundar
(in both W.Ps.)

COMMON ORDER

By this common order both the writ petitions are being disposed of.

2. These writ petitions have been filed for the following relief:

Sl.No.	W.P.No.	Prayer
1.	W.P.No.23755 of 2017	Petition filed under Article 226 of the Constitution of India to issue a Writ of Declaration declaring the impugned communication dated 23.12.2016 in F.No:S.Misc.895/2016-Group-2 issued by the third respondent to the fourth and fifth respondents, as illegal, without jurisdiction, against the provisions of the Act, and null and void.



WEB COPY

Sl.No.	W.P.No.	Prayer
2.	W.P.No.23756 of 2017	Petition filed under Article 226 of the Constitution of India to issue a Writ of Mandamus directing third respondent to issue the Detention Certificate and other appropriate directions to the concerned Authorities to enable the petitioner to comply with the Order-in-Original dated 05.01.2016 bearing No.43805/2016 by re-exporting the subject consignment to its originating country.

3. By the impugned communication dated 23.12.2018, the third respondent has ordered partial waiver of rent and demurrage of the seized consignment only for the period between 27.01.2015 to 19.10.2015. The impugned order reads as under:

OFFICE OF THE COMMISSIONER OF
CUSTOMS (CHENNAI II)
CUSTOM HOUSE, CHENNAI - 600 001
www.chennaicustoms.gov.in

F.No:S Misc.895 /2016-Group 2
Dated:23.12.2016

To

1. M/s. Continental Warehousing Corporation
(Nava Sheva),
Madhavaram,
Chennai-600 110.
2. M/s.Sanco Trans Limited,
No:592, Ennore Express High Road,
Chennai-600 057.

Sir,

Sub: Customs - Order in Original No:43805/2016 dated 05.01.2016 passed by Additional Commissioner of Customs (Group 2) in the SCN issued by CZU-DRI in the case of M/s.Sherisha Technologies Pvt Ltd, Chennai - Regarding.

Please refer letter F.No:VIII/48/54/2010-DRI dated 02.03.2016 of Directorate of Revenue Intelligence, CZU, Chennai, addressed to the Additional Commissioner of Customs (Group 2) and copy marked to you



6. The said writ petition came to be disposed of by order dated 24.08.2015, directing the respondent to consider the petitioner's representation on imported consignment in four tanker containers vide four Bills of Entries back to the supplier. The imported consignment after their import into India was stored in the fourth and fifth respondents Container Freight Station.

7. Under these circumstances, the Additional Commissioner of Customs, the second respondent herein passed the Order-in-Original No.43805 of 2016 dated 05.01.2016. By the aforesaid order, the second respondent held that the imported R22 Refrigerant Gas by the petitioner was without any proper licence and therefore, liable to be confiscated under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962. By the aforesaid order, the second respondent, also imposed redemption of Rs.10,00,000/- under Section 125 of the Customs Act, 1962 on the petitioner to be paid within a period of fifteen days from the date of receipt of a copy of that order and also imposed penalty under Section 112(a) of the Customs Act, 1962. The order also imposed penalty under Section 112(a) and 114(AA) of the Customs Act, 1962 on the Managing Director of the petitioner.

8. The petitioner also appears to have paid redemption fine and the penalty imposed on the petitioner on 22.01.2016. Thereafter, the penalty imposed on the Managing Director under Section 112(a) and 114(AA) of the Customs Act, 1962 was also paid on 22.01.2016 vide separate TR(6) challan.

9. In the light of the above communication dated 29.02.2016, the Assistant Director, Directorate of Revenue Intelligence, T.Nagar, Chennai-17, informed the second respondent to issue necessary instructions to the fourth and fifth respondents herein to comply with the orders of the adjudicating authority.

10. Meanwhile, the petitioner had filed appeals before the Commissioner of Customs Appeal as against the Order-in-Original No.43805 of 2016 dated 05.01.2016 imposing redemption fine and penalty. The aforesaid appeal was dismissed by the Commissioner of Customs (Appeal) vide order dated 19.04.2016 in Order in Appeal C.Cus II No.373 & 374/2016 bearing reference No.C3-II/181 & 182/O/2016-SEA. After these orders came to be passed, the petitioner had sent representations to the third respondent to issue suitable instructions to the fourth and fifth respondents to permit re-export of the imported goods vide letter dated 27.06.2016 and 19.08.2016 and 12.09.2016 by a communication dated 23.12.2016. The third respondent also informed the fourth and fifth respondents to waive rent for the



four containers covered by four Bills of Entries generated between 27.01.2015 to 19.10.2015.

11. It is the specific case of the petitioner that only a partial waiver was granted as per the aforesaid letter dated 23.12.2016 of the third respondent. It is submitted that it is contrary to the Order-in-Original No.40007/2015 in F.No.CAU/DRI/CHE/19/2015 dated 23.07.2015 of the second respondent, wherein, it has been specifically stated that the investigation in the subject case could not be completed by the Officer Directorate of Revenue Intelligence and therefore, Show Cause Notice under Section 124 of Customs Act, 1962 could not be issued within the six months period from the dates of seizure (29.01.2015, 30.01.2015 and 16.03.2015) of the impugned goods, as stipulated by law and in view of the need to thoroughly investigate the entire activities of the companies and involvement of all the persons concerned in the said case of illegal import of R-22 Refrigerant gas by mis-declaring the description and illicit import of R-134a by mis-declaring the description to evade payment of anti-dumping duty, in the name of M/s.Sherisha Technologies by Shri Anil Jain, Directorate of Revenue Intelligence, Chennai Zonal Unit sought extension of time for a further period of six months from 29/07/2015 to 28/01/2016 as envisaged under proviso to section 110(2) of the Customs Act, 1962. Accordingly, extension was granted by Commissioner of Customs, Chennai.II vide Order in Original No.40007/2015 in F.No.CAU/DRI/CHE/19/2015 dated 23/07/2015.

12. The learned counsel for the petitioner further submits that though the petitioner had sent several representations both to the second and third respondents herein, and to the fourth and fifth respondents, the owner of the Freight Station. It is submitted that the imported goods were allowed to remain under their custody and no steps were taken for waiver of rent payable for the period before the aforesaid orders were passed and as a result of which the goods still continue to remain in the custody of the respondents four and five and therefore the petitioner was constrained to file W.P.No.15563 of 2017 before this Court.

13. The learned counsel for the petitioner further submits that the writ petition was filed to issue a writ of Mandamus to direct the third respondent herein to consider the representation of the petitioner dated 05.05.2017 in an expeditious manner. It is submitted that by the aforesaid representation dated 05.05.2017, the petitioner had specifically requested for waiver of demurrage charges / rent on the subject consignment from 27.01.2015 to till the aforesaid date and to render justice.



WEB COPY

14. The learned counsel for the petitioner further submits that the said writ petition was allowed by an order dated 21.06.2017 by directing the respondents to pass appropriate orders on the aforesaid representation of the petitioner within a period of three weeks from the date of receipt of copy of that order.

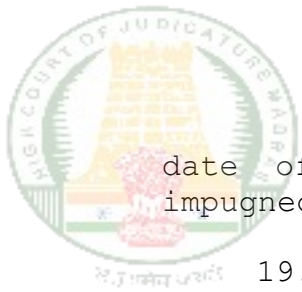
15. The learned counsel for the petitioner further submits that despite the aforesaid order of this Court dated 21.06.2017, no orders were passed by the official respondents. The learned counsel for the petitioner submits that it is in this background, the present writ petition has been filed by the petitioner on 21.08.2017. The learned counsel for the petitioner therefore, submits that the petitioner cannot be forced to bare the demurrage / rent in terms of the provisions stipulated in Regulation 6(1)(1) of the Handling of Cargo in Customs Areas Regulations, 2009.

16. In this connection a specific reference was drawn to regulations under Section 6(1)(1) of the aforesaid regulations in terms of which the fourth and fifth respondents are not required the charge or rent or demurrage due to seizure, detention of confiscated goods.

17. The learned counsel for the petitioner has placed reliance on the following decisions of this Court as under:

- i. Quatar Airways v. Commissioner of Customs (AIR), Chennai reported in 2020 (373) E.L.T.631(Mad.).
- ii. Continental Carbon India Ltd., v. Union of India reported in 2018 (361) ELT 193 (SC).
- iii. Max Enterprises v. Deputy Commissioner of Customs, Chennai reported in 2019(367) ELT 753 (Mad.).
- iv. Priyanka Enterprises v. Joint Commissioner of Customs, Chennai reported in 2018(360)ELT 962 (Mad.).
- v. Balaji Dekors v. Commissioner of Customs, Commissionerate-III, Chennai reported in 2017 (356) ELT 219(Mad.).
- vi. Lala Shri Bhagwan & Anr. v. Shri Ram Chand & Anr. Reported in AIR 1965 SC 1767.
- vii. P. Perichi Gounder Memorial v. Commissioner of Customs (Appeals-II), Chennai reported in 2019 (368)E.L.T.495(Mad.).

18. The learned counsel for the petitioner, therefore submits that there is no justification in waiving only up to the



date of payment of Customs Duty or the date specified in impugned communication dated 27.01.2015 to 19.10.2015.

19. The learned counsel for the petitioner submits that as neither the third respondent nor the fourth respondent or the fifth respondent allowed clearance of export goods and the petitioner cannot be forced to pay the aforesaid rent / demurrage charges.

20. Appearing on behalf of the official respondents / the respondents 1 to 3, the learned Senior Standing Counsel submits that imported goods were prohibited goods and the petitioner had attempted to smuggle these goods as free goods and therefore, the petitioner is not entitled for any waiver.

21. The learned counsel for the respondents further submitted that pursuant to Order dated 21.06.2017 of this Court which was received on 12.09.2017 and two personal hearings were held pursuant to the letters dated 03.10.2017 and 04.10.2018 but the petitioner has not chosen to appear and therefore writ petitions are liable to be dismissed.

22. The learned counsel for the respondents further submits that the petitioner did not come forward to pay the amounts as per the impugned order dated 23.12.2016 of the third respondent herein, though a partial waiver of rent / demurrage was granted for the period between 27.01.2015 and 19.10.2015. Therefore, it is submitted that there is no question of granting any further waiver to the petitioner. It is submitted that the petitioner has to pay the rent / demurrage charges to the fourth and fifth respondents as they cannot be forced waive such amount.

23. The learned Senior Standing Counsel for the official respondents further submits that after the impugned letter was issued to the fourth and fifth respondents on 23.12.2016, there was no further detention under Regulation 6(1)(1) of the aforesaid regulation and therefore the second detention certificate cannot be issued for the goods which are lying in the custody of the fourth and fifth respondents.

24. The learned Senior Standing Counsel for the official respondents specifically submits that in an identical case, this Court has taken a view that the writ petitions are not maintainable and therefore submits that the writ petitions filed by the petitioner are liable to be dismissed.

25. The learned counsel for the respondents further submitted that even as on date, the goods are in the custody of the respondents four and five and continuing to provide service



to the petitioner herein and therefore, the petitioner is duty bound to pay the charges.

26. The learned Senior Standing Counsel for the official respondents has relied on the following decisions as follows:

1. M/s.RM Trading v. The Principal Commissioner of Customs, Chennai-III, Commissionerate Customs House, Chennai and 2 others reported in 2021-TIOL-1496-HC-MAD-CUS.
2. M/s.Isha Exim v. The Commissioner of Customs, Chennai II, Commissionerate, Customs House, Chennai and 3 others reported in W.P.Nos.765 and 1114 of 2018.

27. The learned counsel for the fourth and fifth respondents submits that the imports made by the petitioner are illegal imports and that there was a contractual relationship between the petitioner and therefore, the respondents four and five state that the order came to be passed by the third respondent by Order-in-Original No.43805 of 2016 dated 05.01.2016.

28. The learned counsel for the fourth and fifth respondents has placed reliance on the following decisions of the Hon'ble Supreme Court of India as well as this High Court and Delhi High Court.

1. M/s.International Airports Authority of India v. M/s.Grand Slam International & Others reported in 1995 SCC (3) 151, JT 1995 (2) 452.
2. Shipping Corporation of India v. C.L.Jain Woolen Mills & Ors., reported in 2001 (129) E.L.T. 561 (S.C.).
3. Mumbai Port Trust v. M/s.Shri Lakshmi Steels and Ors., reported in 2017 (352) E.L.T.401(S.C.).
4. Wardha Solar (Maharashtra) Pvt. Ltd., v. Union of India & 3 others in W.P.Nos.15490, 16359, 17114 & 17433 of 2020) dated 22.06.2021.
5. M/s.Sai Lakshmi Engineering Limited v. Principal Commissioner of Customs and 4 others in W.P.No.14370 of 2018 dated 01.07.2021.
6. Trip Communication Pvt. Ltd., v. Union of India & Others reported in 2014(302) ELT 321 (Del.)
7. Muscle Fusion Fze v. The Principal Commissioner of Customs & Ors., reported in 2017(354) ELT 525 (Del.).
8. Mate (India) Pvt. Ltd., v. Commissioner of Customs (ICD) and others reported in 2020 (373) E.L.T.666 (Del).



WEB COPY

9. International Lease Finance Ltd., v. Union of India and others in W.P.(C) 6490/2018 dated 27.03.2018, (Delhi High Court)..
10. Polytech Trade Foundation v. Union of India & Ors in W.P.(C) No.3029/2020 dated 27.05.2021 (Delhi High Court).

29. No doubt, the petitioner had attempted to illegally import R22 Refrigerant Gas in the guise of R410A Refrigerant Gas, in order to clear that without license. The second respondent by Order-in-Original No.43805 of 2016 dated 05.01.2016 had categorically concluded the imports made by the petitioner covered by the four separate Bills of Entries were un-authorized and they were liable to be confiscated under the provisions of the Customs Act, 1962.

30. Accordingly, the following orders were passed

- i. I order that the declared description as R-410a is rejected and changed to correct description as R-22.
- ii. I confiscate the impugned 80,000 Kg of R-22 gas imported in 4 containers and totally valued at Rs.1,15,77,832/- (Rs. One Crore Fifteen Lakh Seventy Seven Thousand Eight Hundred Thirty Two Only) under Section 111(d), 111(1), and 111(m) of the Customs Act, 1962.
- iii. I give an option to importer to redeem the goods only for purpose of re-export back to the supplier of impugned goods in country from where export of impugned goods were made to India, subject to payment of Redemption Fine of Rs.10,00,000/- (Rs. Ten Lakh Only) under Section 125 of the Customs Act, 1962 within 15 days from receipt of the order.
- iv. I impose a penalty of Rs.10,00,000/- (Rs. Ten Lakh Only) on M/s STPL under Section 112(a) of the Customs Act, 1962.
- v. I impose a penalty of Rs.10,00,000/- (Rs. Ten Lakh Only) on Sh. Anil Jain, MD of M/s. STPL under Section 112(a) of Customs Act, 1962.
- vi. I levy a penalty of Rs.5,00,000/- (Rs. Five Lakh Only) on Anil Jain under Section 114AA of the Customs Act, 1962. However, I refrain from



levying penalty on M/s.STPL under Section 114AA of Customs Act, 1962 since no knowledge or intention may be attributable to a legal person.

31. The petitioner has also paid the redemption fine and penalty imposed by the second respondent vide Order in Original No.43805 of 2016 dated 05.01.2016. Therefore, the petitioner should have been allowed to re-export the imported R22 refrigerant gas back to the foreign exporter from China at least after 22.01.2016.

32. However, the petitioner filed appeal before the Commissioner Appeals against the aforesaid order in Appeal Nos.C3-II/181/O/2016-Sea and C3-II/182/O/2016-Sea. These appeals were eventually dismissed by the Commissioner (Appeals-II) vide Order in Appeal C.Cus II No.373 & 374/2016 dated 19.04.2016 bearing reference No.C3-II/181 & 182/O/2016-SEA.

33. Thus, the petitioner also did not take any steps for re-exporting the imported R22 Refrigerant Gas. As per the regulations 6(1) of the Handling of Cargo in Customs Areas Regulations, 2009 framed under sub-Section (2) of Section 141 read with Section 157 of the Customs Act, 1962, the Customs Cargo Service Providers 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.

34. The facts of the case indicates that the third respondent vide impugned order dated 23.12.2016 has granted partial waiver of demurrage for the period between 27.01.2015 (being the date of seizure) upto 19.10.2015, under the regulations of 6(1) of the Handling of Cargo in Customs Areas Regulations, 2009. The relevant portion has been extracted below:

6. Responsibilities of Customs Cargo Service Provider:

(1). The Customs Cargo Service Provider shall -
(1) 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.

35. The issue of detention certificate was considered by this Court in Qatar Airways Vs. The Commissioner of Customs (AIR), Chennai, 2020 (373) E.L.T.631 (Mad.).



36. The aforesaid case was rendered in the context of the Airport Authority of India under the provisions of The Airport Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal Mail) Regulations, 2003 and Handling of Cargo in Customs Areas Regulations, 2009. Elaborate discussion was made after taking note of the following decisions of the Hon'ble Supreme Court in the following cases.

- i. Board of Trustees of the Port of Bombay Vs. Jai Hind Oil Mills Company, (1987) 1 SCC 648.
- ii. Trustees of the Port of Madras Vs. M/s. Aminchand Pyarelal, (1976) 3 SCC 167.
- iii. International Airports Authority Vs. Grand Slam International, (1995) 3 SCC 151.
- iv. Mumbai Port Trust Vs. Shri Lakshmi Steels, (2018) 14 SCC 317.

37. Apart from the above, this Court has also considered the decision of the Delhi High Court in the case of Trip Communication Private Limited Vs. Union of India in W.P.(C.No). 7438 of 2014 dated 28.03.2014 in Quatar Airways Vs. The Commissioner of Customs (AIR), Chennai, 2020 (373) E.L.T.631 (Mad.).

38. It will be useful to extract the discussion from Quatar Airways Vs. The Commissioner of Customs (AIR), Chennai, 2020 (373) E.L.T.631 (Mad.) for the purpose of this case. Therefore paragraphs 55 to 92 are extracted below:

"55. The Airport 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 authorized 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.



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:-



WEB COPY

"(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



WEB COPY

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



WEB COPY

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



WEB COPY

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



WEB COPY

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.



WEB COPY

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.



WEB COPY

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



WEB COPY

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



WEB COPY

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.

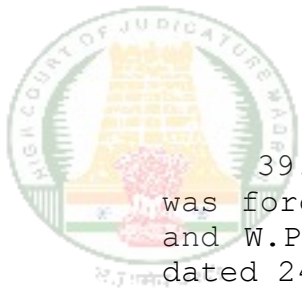
88. The petitioner may therefore establish before the 1st respondent that there was total or near total disruption of work due to alleged arrest of the customs officers and therefore, there was delay in receiving and processing of transshipment application and therefore the petitioner is entitled to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



39. The facts on record also indicates that the petitioner was forced to approach this Court earlier in W.P.No.4207 of 2015 and W.P.No.15563 of 2017 which came to be disposed by an order dated 24.08.2015 and 21.06.2017 respectively.

WEB COPY

40. The former writ petitions was filed for a mandamus to consider the petitioner's representation for permitting the petitioner to re-export the imported consignment of R22 Refrigerant Gas which was later allowed to be re-exported on payment of redemption fine/penalty on 24.08.2015, by directing the official respondents to decide the issue. Thereafter, the Order in Original No.43805 of 2016 dated 05.01.2016 came to be passed by the second respondent Additional Commissioner of Customs (Gr-2).

41. The second writ petition was later filed by the petitioner once again for a mandamus to consider the petitioner's representation dated 05.05.2017 in an expeditious manner after the second respondent Additional Commissioner of Customs (Gr-2) passed Order in Original No.43805 of 2016 dated 05.01.2016 and after the petitioner's appeal was dismissed vide order in Appeal C.Cus II No.373 & 374/2016 dated 19.04.2016 by the Commissioner of Customs (Appeal-II). The said representation was filed for consideration and disposal of the petitioner's representation for full waiver of demurrages payable to the fourth and fifth respondents.

42. The facts on record clearly indicate that the official respondents have also not co-operated with the petitioner for re-export R22 Refrigerant Gas, despite, the Order in Original No.43805 of 2016 dated 05.01.2016 of the second respondent and the subsequent dismissal of the appeal of the petitioner vide Order in Appeal C.Cus II No.373 & 374/2016 dated 19.04.2016.

43. Despite, Order in Original No.43805 of 2016 dated 05.01.2016 passed by the second respondent Additional Commissioner of Customs (Gr-2) as affirmed by the Commissioner of Customs (Appeals-II) vide Order in Appeal C.Cus II No.373 & 374/2016 dated 19.04.2016, the imported goods were not allowed to be re-exported and remained in the custody of the private respondent mainly fourth and fifth respondents.

44. The private respondents namely the fourth and fifth respondents cannot be forced to bear the loss suffered by them on account of storage of R22 Refrigerant Gas imported by the petitioner illegally which was earlier attempted to be cleared contrary to the restriction for the period after Order in Appeal C.Cus II No.373 & 374/2016 dated 19.04.2016 was passed by the Commissioner of Customs (Appeals-II). The petitioner also cannot



be burdened with the demurrage liability for the period thereafter as the goods were not allowed to be re-exported despite the above mentioned orders. Therefore, partial waiver up to 19.10.2015 is liable to be sustained.

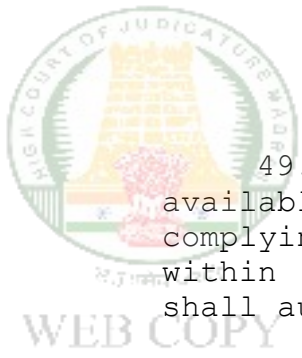
WEB COPY

45. Therefore, while upholding the impugned order of the third respondent dated 23.12.2016. I am also inclined to hold that the demurrages for the period between 19.10.2015 and passing of the Commissioner of Customs (Appeal-II) vide Order in Appeal C.Cus II No.373 & 374/2016, bearing reference No.C3-II/181 & 182/O/2016-SEA dated 19.04.2016 will have to be borne by the petitioner, as the petitioner showed no inclination to re-export the consignment. For the period thereafter, the loss caused to the fourth and fifth respondents on account of storage of R22 Refrigerant Gas will have to be borne by the Customs Department.

46. Since the goods are still reportedly in the custody of the fourth and fifth respondents, I direct the official respondents as also the fourth and fifth respondents to permit re-export of the imported consignment by the petitioner to the foreign exporter from China provided the consignment of imported R22 Refrigerant Gas are still there in the containers and have not evaporated due to efflux of time as expeditiously as possible from the date of receipt of a copy of this order, subject to the petitioner paying the demurrage charges to the fourth and fifth respondents for the period between 19.10.2015 up to 19.04.2016 together with applicable interest.

47. The amount is directed to be calculated by the fourth and fifth respondents as expeditiously as possible, preferably, within a period of thirty days from the date of receipt of a copy of this order and suitably intimated to the petitioner.

48. On such intimation of the amount together with applicable interest to be paid by the petitioner, the petitioner shall pay the same and the petitioner shall be allowed to re-export the imported R22 Refrigerant Gas as expeditiously as possible, preferably, within fifteen days thereafter. The Customs Department is directed to make good the loss suffered by the private respondents namely the fourth and fifth respondents for forcing them to store the imported R22 Refrigerant Gas despite Order in Original No.43805 of 2016 dated 05.01.2016 and Order in Appeal C.Cus II No.373 & 374/2016 dated 19.04.2016 of the Commissioner of Customs (Appeals-II). In case the amount determined by the fourth and fifth respondent is excessive according to the petitioner, the petitioner shall pay the amount without prejudice to its right to recover the same from fourth and fifth respondent in the manner known to law.



49. It is made clear that partial waiver granted herein is available to the petitioner subject to the petitioner strictly complying with the terms of this order without any deviation within the period specified above, failing which this order shall automatically stand vacated.

50. This Writ Petition stands partly allowed in terms of the above observations. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

rgm/ssn

To

1. The Chief Commissioner of Customs,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.
2. The Additional Commissioner of Customs,
Group-II,
No.60, Rajaji Salai,
Chennai - 600 001.
3. The Deputy Commissioner of Customs,
Group-II,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.V.P.Raman, Petitioner, Advocate, S.R.No.35494
+1cc to Mr.V.Sundareswaran, Senior Panel Counsel, S.R.No.34659
+2ccs to Mr.K.Bijai Sundar, Respondents 4 & 5, Advocate,
S.R.Nos.34412 & 34413

W.P.Nos.23755 and 23756 of of 2017
and
W.M.P.No.24970 of 2017

NR(CO)
RLP(06/07/2022)