BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

WP(MD)No.22142 of 2023
and W.M.P(MD).No.18462 of 2023

M/s.Kern Enterprises Private Limited,
Kern ICD (Custodian)
Rep.by its Director,
H.Nagarajan .. Petitioner

vs.

1.The Government of India,
Rep.by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.Central Board of Indirect Taxes and Customs,
Rep.by its Chairman,
Department of Revenue,
Ministry of Finance,
New Delhi.

3.The Commissioner of Customs (Pre.V),
O/o.The Commissioner of Customs(Prev.),
Trichy. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India seeking issuance of a Writ of Mandamus, directing the second respondent to denotify the petitioner ICD with effect from 01.04.2023, in pursuance of the application dated 14.02.2023 preferred by the petitioner Company within the period that may be stipulated by this Court.

For Petitioner	:	Mr.Ajmal Khan Senior Counsel for Ajmal Associates
For Respondents	:	Mr.P.Nandakumar Senior Standing Counsel

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O R D E R

This Writ Petition has been filed seeking for a direction to the second respondent to denotify the petitioner's Inland Container Depots with effect from 01.04.2023, by considering the application, dated 14.02.2023 submitted by the petitioner Company.

2. The Government of Tamil Nadu, in order to decongest the existing Ports, has opened the ICDs/CSFs/ACCs/EPZs in the Country to encourage foreign trade and exports by facilitating Customs Clearance of goods at multiple points and the

appointment of Inland Container Depots (ICDs) was made under Section 7 of the Customs Act. The petitioner Company is one among such Inland Container Depots appointed under the said Act by the second respondent Board. The petitioner Company has approached the respondents to denotify their Inland Container Depots on the ground that they are intending to lease out their property for some other purpose. The request made by this petitioner in the month of February 2023 was not considered by the respondents and therefore, the petitioner has approached this Court seeking a direction to the second respondent to denotify their Inland Container Depots with effect from 01.04.2023, based on their application, dated 14.02.2023.

3. In response to this writ petition, the respondents have filed a counter affidavit stating that though the petitioner claims that they have paid the Cost Recovery Charges upto 31.03.2023, the Deputy Commissioner of the respondents Department has reported that the custodian has paid the Cost Recovery Charges on apportioned basis for the officers deployed from other Customs formations and on additional charge. The Cost Recovery Charges to the tune of Rs.51,64,199/- (Rupees Fifty One Lakhs Sixty Four Thousand One Hundred and Ninety Nine only) were adjusted towards the payment of Cost Recovery Charges for the period

from January 2022 to December 2022. However, the petitioner has raised the issue of payment of Cost Recovery Charges vide letters, dated 20.12.2021 and 16.04.2021 before the Commissioner and the same was not accepted by the Commissioner. Thereafter, a letter dated 16.08.2022 was addressed to the Assistant Legal Advisor, Department of Legal Affairs, Shastri Bhavan, Chennai, to clarify the fact as to whether the request of the petitioner is legally tenable or not. In reply to the same, the Deputy Legal Advisor (Retd) & Consultant, Ministry of Law and Justice, Department of Legal Affairs, Branch Secretariat, Chennai, vide letter, dated 26.08.2022, has stated that the request of the petitioner appears to be legally tenable and requires to be considered by the Department. Thereafter, the Deputy Commissioner of the respondents Department has addressed a letter, dated 22.08.2023 to M/s.Fortland Food and Beverages Private Limited to remove the duty paid fertilizer from the petitioner ID custody as the Custodian has filed Denotification Application. In reply to the same, M/s.Fortland Food and Beverages Private Limited has stated that they are in the process of selling the entire duty paid stock of fertilizer at Madurai and it will be removed as soon as the sale agreement is finalised. Since the uncleared goods are lying in the facility, the facility is not ripe for denotification.

4. With regard to the question as to whether any uncleared/detained/seized/confiscated goods are lying at the premises, the petitioner has answered that kiwi fruits imported by M/s.Ram Traders, Madurai have been confiscated and ordered for re-export by the Joint Commissioner, Customs, Trichy, on payment of redemption fine and penalty. One more hurdle in de-notification of the petitioner was that nine containers containing kiwi fruits lying at the facility were uncleared. In this regard, an order was passed by the Joint Commissioner of Customs dated 13.01.2023, imposing penalty on M/s.Ram Traders, Madurai, for re-exporting of the confiscated goods and thereafter, the Deputy Commissioner, vide letter dated 20.07.2023, has reported that nine containers of kiwi fruits were destructed. Hence, the condition in paragraph No.13(iii) of Circular No.20/2021-Customs dated 16.08.2021 was fulfilled only on 20.07.2023. However, the petitioner Company is not ripe for denotification as there is a dispute in the payment of Cost Recovery Charges by the petitioner, for which, the Directorate General of Human Resources & Development has been addressed through proper channel (i.e.,) the Chief Commissioner, Trichy, requesting for clarification vide letter, dated 08.06.2023. According to the learned Standing Counsel, the cost of salary of the Customs officials has to be borne out by the Company, since they have been deployed to the Company on additional

charges. Therefore, the petitioner Company is liable to pay the said amount of Rs.51,64,199/- (Rupees Fifty One Lakhs Sixty Four Thousand One Hundred and Ninety Nine only) and on payment of the said amount, the petitioner's Inland Container Depots would be denotified.

5. The learned Senior Counsel appearing for the petitioner, by referring to the counter affidavit and the opinion given by the Department of Legal Affairs, submits that though the staffs have been sanctioned for the petitioner's Inland Containers Depots, they were not deployed for the period from June 2018 to March 2019. Now, the Department is claiming those charges for the period when the Custom Officials have not been deployed and on the request of the petitioner, the charges were adjusted towards subsequent years. The learned Senior Counsel has also relied on the opinion given by the Legal Advisor, Department of Legal Affairs of Government of India in this regard dated 26.08.2022 and the same is extracted hereunder:

> “*Referring Department, vide its letter cited under reference, has sought opinion on the request from M/s.Kern Enterprises (Pvt.) Ltd., for adjustment of the cost of Recovery charges deposited by them under Handling of Cargo in Customs Areas Regulations, 2009.*

Gone through the reference. The issue involved was discussed at length by the undersigned on 24.08.2022 with Shri.N.Ravi, Superintendent (Customs). Facts of the case are elaborately contained in the reference sent by the Department. Hence, the same are not repeated for sake of brevity.

It is seen from the reference that no Customs Officers were posted exclusively at the ICD at Madurai, viz., M/s.Kern Enterprises (Pvt.)Ltd., and officers posted at the Customs Preventive Unit (CPU), Madurai, were deputed to attend the work at ICD Madurai whenever required, however, Cost Recovery Charges were demanded from the ICD on quarterly basis for such officers who were deputed from the CPU Madurai and the ICD, viz., M/s.Kern Enterprises (Pvt.) Ltd., had deposited the cost recovery charges as demanded by the Customs authorities. Subsequently, M/s.Kern ICD has raised a dispute that such demand of cost recovery charges is not legal on the ground that no officer was exclusively posted at their ICD and the CPU Officers who were given dual charges were not paid any additional allowance for their deputation work at ICD and the Customs Department has not incurred any expenditure and thus the demand of cost recovery charges is not legal. Therefore, M/s.Kern ICD has requested to adjust the cost recovery charges deposited by them during the period when officers were not exclusively posted at their ICD on cost recovery basis.

Also perused the arguments put forward by M/s.Kern ICD (as forwarded by the referring Department) and this Branch Secretariat is of the view that their request appears to be legally tenable and requires to *be considered by the Department. Regarding the query whether the rejection of the request of the IDC will stand the test of law, this Branch Secretariat cannot answer/opine on such queries. However, the chance of success in case of rejection appears to be very remote.*

Opined accordingly. Papers returned."

6. With regard to this legal opinion, the Department has also taken a stand that they have made a request for clarification with the higher officials.

7. This Court considered the rival submissions made by both sides and perused the materials available on record.

8. Admittedly, the Customs officials have been sanctioned to the petitioner Company only on additional charges and not on regular basis. However, the Department is claiming charges from the petitioner for the period during which the officials have not been deployed. Though the charges appeared to have been adjusted towards subsequent years, an opinion has also been sought for from the Legal Advisor and an opinion was given to the effect that for the period when the deployments have not been made, the Department is not supposed to collect the amount. With regard to Cost Recovery Charges in respect of ICDs/CSFs, the

Ministry of Finance, Government of India, Department of Revenue, Central Board of Excise and Customs, vide its Circular, dated 25.07.2008, has also issued a clarification and the same is extracted hereunder:

> "*2.The matter has been carefully considered in the Board. The basic purpose of the 'cost recovery system' in respect of ICDs/CFSs is to 'recover' the 'cost' being incurred by the Department. In this context, the points raised by you are clarified as follows:*
>
> > *a. The cost recovery charges should be demanded in respect of officials actually posted to ICDs/CFSs, irrespective of the sanctioned strength.*
> >
> > *b. If a particular officer is given charge of more than one ICD/CFS, the cost recovery charges in respect of such officer should be apportioned amongst the concerned ICDs/CFSs.*"

9. In a subsequent Circular issued by the Ministry of Finance, Government of India, Department of Revenue, Anti-Smuggling Unit (CBC) dated 19.01.2021, the payment of Cost Recovery Charges has been stated as follows:

> "*7.1.The Cost Recovery Charges shall be payable by facilities at the uniform rate of 1.85 times of the monthly average cost of the post plus other allowances (such as Dearness Allowance, House Rent Allowance etc.,). For this purpose, the following factors may also be kept in view for working out the cost regarding all the cost recovery posts:*

i. Additional dearness allowance as and when sanctioned by the Government should be considered and arrears shall be recovered; and

ii. If the relevant staff is in possession of government accommodation and do not draw house rent allowance. Even then, the notional house rent allowance as admissible to them should be taken into account on cost recovery basis.

7.2 The Cost Recovery Charges would be payable in respect of officers actually deployed at the facility. Where the officers are posted in excess of norms, Cost Recovery Charges for such excess number of officers shall be payable. However, this situation shall not ordinarily arise. If a particular officer is given charge of more than one facility, the Cost Recovery Charges shall be apportioned amongst the facilities concerned."

10. In view of the Circulars and the opinions as referred to above, this Court is of the view that the claim of the respondents in respect of Cost Recovery Charges for deployment of the additional Customs Officials to the petitioner's Input Containers Depots for the period during which the services of the Customs officials have not been utilised by the petitioner is not justified and on that ground, they are not supposed to deny the request of the petitioner to denotify their Inland Container Depots. Therefore, the respondents shall denotify the petitioner's Inland Container Depots within a period of two weeks from the date of receipt of a copy of this order. However, the respondents can work out their remedy with regard to

the Cost Recovery Charges, if any, liable to be paid by the petitioner in the manner known to law, after obtaining clarification from the Directorate General of Human Resources & Development (DGHRD), Delhi.

11. Accordingly, this Writ Petition is disposed of. There shall be no order as to costs. Connected miscellaneous petition is closed.

04.12.2023

Index : Yes / No
NCC : Yes / No
Internet : Yes
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B.PUGALENDHI, J.

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