

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Reserved on: 20.01.2023
Pronounced on: 14.02.2023

+ **W.P.(C) 982/2015 and C.M. No. 1736/2015**

BHAVIK S. THAKKAR

..... Petitioner

Through: Dr. D.K. Sarkar, Ms.
Malabika Sarkar and Mr.
Prashant Srivastava,
Advocates.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Gaurav Sarin, Sr. Panel
Counsel for R-1.
Mr. Arun Kumar, Advocate
for R-2.
Mr. Satish Kumar, Sr.
Standing Counsel with Ms.
Vaishali Goyal, Mr. Dhruv
and Ms. Anushree Narain,
Advocates for R-3.

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The present Writ Petition has been preferred by the Petitioner under Article 226 of Constitution of India seeking the following prayers:

“(i) Direct the respondent no. 2 to release the goods immediately without charging demurrage/detention charges or rent;

- (ii) *Direct the respondent nos. 1 to 3 to pay appropriate compensation for their negligence and apathy leading to perishing/deterioration of goods;*
- (iii) *Direct the respondent no. 4 to initiate appropriate action against respondent no. 2 for suspension/revocation of approval as Customs Cargo Service Provider for the violation of provisions of Handling of Cargo In Customs Area Regulations, 2009 in as much, the demurrage/detention charge has been imposed in respect of goods in respect of which detention certificate has duly been issued by the Customs;*
- (iv) *Pass any other order(s) or direction (s) which this Hon'ble Court may deem fit and proper in favour of petitioner."*

FACTS RELEVANT FOR THE CONSIDERATION OF THE PRESENT CASE ARE AS FOLLOWS:

2. It is the case of the Petitioner that he had been working since 2005 with his father and helping him in the business of trading and brokerage of MS Scrap under the name M/s Shri Krishna Enterprises.
3. The Petitioner imported certain consumer goods like deodorants, body spray, Dove soaps, and perfumes etc. from M/s White City Trading LLC P.O. Box No. 120762, Dubai in a 40 ft. container bearing No. IALU 4563215. Bill of Entry No. 6209020 was filed on 09.03.2012 at Inland Container Depot, Tughlakabad, New Delhi ('ICD, TKD') in the name of M/s Dynamic Marketing Inc. situated at H-6-221, Aggarwal Tower, Netaji Subhash Place, Pitampura, New Delhi. However, in the Bill of Entry, the Petitioner declared all the goods as 'mixed deodorants and the

Petitioner paid the assessed Custom duty of Rs. 4,25,429/- (Rupees Four Lakh Twenty-Five Thousand Four Hundred and Twenty-Nine Only) vide TR-6 Challan No. 2003178238 dated 12.03.2012 on these mis-declared goods.

4. The officers of Directorate of Revenue Intelligence (hereinafter referred to as 'DRI') received intelligence information about the said mis-declaration and consequently, reached ICD, TKD in order to intercept the said container. They located the said container loaded on a truck bearing No. HR 38F 4835 and the truck was in the exit lane, ready to exit from ICD, TKD as the said container had already received clearance from Customs.
5. Thereafter, the aforesaid container was detained vide *Panchnama* dated 13.03.2012 and later on, it was examined on 14.03.2012 at ICD, TKD. On examination, it was found that other than the deodorants, there was huge quantity of other goods such as soaps, perfumes, cigarettes in the container which were not declared in the Bill of Entry filed for the clearance of the container. Since the Petitioner had tried to clear these undeclared goods by mis-declaration, the aforesaid whole container was seized by the DRI officers under the provisions of Customs Act, 1962 vide *Panchnama* dated 14.03.2012.
6. During the pendency of investigation, the Petitioner admitted the fact that he was the actual importer of the goods in the container and requested the DRI officers vide Letters dated 08.08.2012 and 05.09.2012 for provisional release of the goods since the same were likely to be deteriorated but no response was given

by DRI.

7. After completion of investigation, the DRI issued a Show Cause Notice bearing DRI F.No.338-XIV/28/2012 dated 12.09.2012 to the Petitioner, whereby the total wholesale market value of all the imported goods was calculated at Rs. 2,32,12,380/- (Rupees Two Crore Thirty-Two Lakh Twelve Thousand Three Hundred and Eighty only). It was further proposed to explain as to why imported goods should not be confiscated under Section 111(d), (f), (g), (j), (l) and (m) of the Customs Act, 1962 and penalty should not be imposed under Section 112(a), 112(b), 114A and 114AA of the Customs Act, 1962.
8. Pursuant to the issuance of the show cause notice, the Petitioner again sent several Letters dated 18.10.2012, 01.11.2012 and 12.12.2012 to the Commissioner of Customs, ICD, TKD ('Respondent No. 3') requesting for provisional release of the seized goods and also showing his intent to move to the Settlement Commission.
9. Pursuant to the abovesaid Letters, Respondent No. 3 allowed the request of provisional release of seized goods with certain conditions vide Order No. 41/2012 dated 21.12.2012. The Petitioner was asked to submit 100% Bank Guarantee equivalent to duty amount and separate Indemnity Bond with Bank Guarantee of 10% of assessable value be furnished by the Petitioner.
10. The Petitioner did not get the goods provisionally released due to his insufficiency to fulfil the conditions of provisional release,

however, he moved an application for inspection and drawl of sample of the seized goods. Pursuant to inspection and drawl of sample, the Petitioner found that all the cigarettes had expired and had no market value left. Therefore, Petitioner sent a Letter dated 01.02.2013 to Respondent No. 3 requesting for abandonment/ relinquishment of title of the cigarettes but the said request was not allowed.

11. Thereafter, the Petitioner moved to the Settlement Commission on 28.04.2014 after paying the admitted duty of Rs. 27,88,010/- (Rupees Twenty Seven Lakh Eighty Eight Thousand and Ten only) i.e. duty calculated after excluding the duty on cigarettes as they had been completely damaged. The Settlement Commission vide its Order dated 19.08.2014 was pleased to settle the case under Section 127C (5) of the Customs Act, 1962 on the condition that the Petitioner pays the complete custom duty amounting to Rs. 49,54,921/- (Rupees Forty Nine Lakh Fifty Four Thousand Nine Hundred and Twenty One only) on all the imported goods including the cigarettes. Further, the Settlement Commission imposed a penalty of Rs. 2,00,000/- upon the Petitioner and a fine of Rs. 1,00,000/- in lieu of confiscation of imported goods.
12. All these terms mentioned in the Order dated 19.08.2014 passed by the Settlement Commission were adhered to by the Petitioner. Consequently, the detention certificate was issued from the office of Respondent No. 3. Further, a Letter dated 30.09.2014 was also issued by Respondent No. 3 whereby NOC was given

with regard to release of seized goods to the Petitioner. It was further mentioned in the said letter that under provisions of Regulation 6(1)(l) of the Handling of Cargo in Customs Area Regulation, 2009 (“**HCCAR, 2009**”) read with Public Notice No. 26/2010 dated 02.03.2010, no demurrage/ detention charge or rent may be levied upon the Petitioner. The said letter dated 30.09.2014 further stated that violation of aforesaid Regulations would attract penal action under the Regulations of HCCAR, 2009.

13. However, Respondent No. 2 vide its letters dated 07.11.2014 and 11.11.2014 denied the waiver of demurrage/ detention charges in view of its policy that no request for waiver will be entertained in case where any penalty/ fine/ personal penalty/ warning has been imposed by custom authorities.
14. The Petitioner moved a Letter dated 12.01.2015 before Respondent No. 2 for reconsideration of its waiver request but the said request was declined by Respondent No. 2 by its Letter dated 19.01.2015 and it further asked the Petitioner to collect the seized goods within 10 days after paying the charges due, otherwise the seized goods would be put to auction as per Custom Rules.
15. Being aggrieved by the Terminal Service Charges (hereinafter referred to as ‘TSC’) imposed by Respondent No. 2, the Petitioner moved the present Writ Petition before this Court. This Court vide order dated 02.02.2015 restrained Respondent No.2 from auctioning the goods of the Petitioner.

SUBMISSIONS ADVANCED BY THE PETITIONER

16. The main contention of the learned counsel for the Petitioner is that the policy of CONCOR states that no request for waiver of demurrage charges or rent will be entertained where any fine, penalty or warning has been imposed by the custom authorities. However, in the case of the Petitioner, a nominal penalty was imposed and that too was imposed by the Settlement Commission and not by any custom authority. It is submitted by the learned counsel for the Petitioner that Settlement Commission cannot be considered as a custom authority as the former is an independent body/ forum constituted under Section 32 of the Central Excise Act, 1944.
17. It is further submitted that moving an application for settlement before Settlement Commission was not an admission of offence. It is submitted that any case decided by the Settlement Commission is not an adjudicating order but a settlement made between the parties. Therefore, the denial of request of waiver by CONCOR stating its policy was in gross violation of regulations provided in HCCAR, 2009.
18. Another contention of learned counsel for the Petitioner is that the denial of waiver of demurrage charges by CONCOR as per its policy was in violation of Regulation 6(1)(l) of HCCAR, 2009 read with Public Notice No. 26/2010 issued by the custom authorities which provide that no demurrage or rent is to be charged for period of seizure if detention certificate is issued by customs in respect of such period. It is submitted by the learned

counsel for the Petitioner that CONCOR was granted license to function as Customs Cargo Service Provider under HCCAR, 2009 only and therefore, it is subject to the Regulations provided in HCCAR, 2009 and so it should have waived off the TSC once the detention certificate was issued by the custom authorities.

19. Learned counsel for the Petitioner has further averred that the policy of CONCOR on the basis of which it denied waiver of TSC to Petitioner is contrary to the law i.e. Regulation 6(1)(l) of HCCAR, 2009 read with Public Notice No. 26/2010. It is stated that CONCOR policies cannot be contrary to statutory provisions of law. It is averred by the learned counsel for Petitioner that HCCAR, 2009 have been made under the provisions of Custom Act and therefore HCCAR, 2009 has a force of law. Further, it has been stated that the CONCOR is recognized as a Cargo Service Provider under the provisions of HCCAR, 2009 and a Cargo Service Provider is removed by a Commissioner of Custom as per the provisions of HCCAR, 2009 only. Thus, a Cargo Service Provider is subject to the Customs Act and it would have to work under the purview of HCCAR, 2009 only. Therefore, CONCOR cannot make a policy which is contrary to the provisions of HCCAR, 2009 and so, the TSC should be removed.

20. Further, the learned counsel for the Petitioner averred that the Petitioner had made several requests to Respondent No. 3 to warehouse the seized goods in order to avoid demurrage/ detention charges being applied against him with respect to

seized goods. But, Respondent No. 3 issued the provisional release order after a huge delay and that too with very harsh conditions of furnishing 100% Bank Guarantee of payable duty amount and separate Indemnity Bond with Bank Guarantee of 10% of assessable value amongst other conditions. Therefore, due to apathy and negligence of Respondent No. 3, the goods were never warehoused.

21. With these submissions, learned counsel for the Petitioner prays for the release of the goods after waiving the demurrage/detention charges.

SUBMISSIONS ADVANCED BY THE RESPONDENTS

22. The Terminal Manager of CONCOR, ICD, TKD had filed a Counter Affidavit on behalf of Respondent No. 2.
23. It is submitted by the learned counsel for CONCOR that CONCOR was made under the Ministry of Railway with a mission to profitably satisfy customer's needs for high-quality, cost-effective logistics services. CONCOR incurred huge expenditure in developing ICD and the infrastructure to provide container/ cargo handling and storage services to the importers and exporters. Further, CONCOR has to incur huge operating expenditure on the maintenance, safety and security of the cargo/ containers and infrastructure in these ICDs. However, the main source of income of CONCOR is from container/ cargo handling and storage services rendered to customers. Thus, any regulation depriving CONCOR from making revenue after providing its

services is bad in law.

24. It is further averred that CONCOR, being a commercial organization formed from public exchequers cannot give rebate or waive the rent /charge from user in blanket manner. It has an elaborate procedure set forth for refund of fee on case to case basis after ground rent received and goods removed from the warehouse. It is further averred that the regulations cited by the Petitioner are not applicable to CONCOR.
25. It is further submitted by the learned counsel for CONCOR that Section 63 of the Customs Act, 1962 empowers the warehouse keeper to levy rent and warehouse charges or other charges. Therefore, it is the contention of CONCOR that any circular or otherwise notification or subordinate legislation cannot abridge the power directly provided under the Act.
26. It is the contention of the learned counsel for CONCOR that HCCAR, 2009 made under section 141 read with 157 of Customs Act just gives general power to the Board to make regulations consistent with the Customs Act which is subject to any other law in force. Therefore, any circular or notification or subordinate legislation in contravention of provisions of Customs Act is not applicable to CONCOR. Thus, Regulation 6(1)(i) of HCCAR, 2009 is not applicable to CONCOR and consequently, the Petitioner cannot avail the benefit of waiver of demurrage charges.
27. Learned counsel for CONCOR further argued that Regulation 6(1)(i) of HCCAR, 2009 starts with a subjective clause

subjecting it to any other law for the time being in force. It is stated that Section 63 provides CONCOR with the power to levy rent and warehouse charges, and the said provision was in force at the time of denying the waiver of TSC, so the Regulation 6(1)(l) of HCCAR, 2009 was not applicable to CONCOR.

28. It was further contented that CONCOR has a right to recover charges under Indian Contract Act as a bailee since all the goods stored by CONCOR at ICD are covered under the law of bailment provided in Indian Contract Act, 1872. Learned counsel for CONCOR referred to Sections 158, 170 and 171 of Indian Contract Act highlighting the rights of the bailor therein.
29. Learned counsel for CONCOR submitted that the issue raised before this Court in the present Writ Petition is squarely covered in the decision of Division Bench of this Court in the case of *Trip Communication Pvt. Ltd. Vs Union of India* reported as **2014 SCC Del 1318** and the counsel for CONCOR has placed strong reliance on the same.
30. Respondent No. 3 also filed its Counter Affidavit wherein it was stated that the contention of the Petitioner pertaining to abandoning of the goods cannot be accepted in view of the provisions of Section 23 of the Customs Act, 1962 read with proviso. Learned counsel for Respondent No. 3 has further stated that the imported goods in the present case were seized by DRI officers after out of charge was given, therefore, the seized goods could not have been abandoned by the Petitioner.
31. Further, the learned counsel for Respondent No. 3 has also

placed reliance on the decision of Division Bench of this Court in the case of *Trip Communication (supra)*.

32. With these submissions, learned counsel for Respondent No.2 &3 prays for the dismissal of the present Writ Petition.

LEGAL ANALYSIS

33. This Court has heard the arguments advanced by the learned counsel for the parties and has also examined the evidence placed on record and the judgments relied upon by the parties.

34. Learned counsel for the Petitioner argues that the denial of waiver of TSC as per its policy was in gross violation of Regulation 6(1)(l) of HCCAR, 2009 once detention certificate was issued by Respondent No. 3 stating that demurrage/ detention charges or rent should not be charged. He has stated that CONCOR has been recognized as a Cargo Service Provider by Respondent No. 3 under HCCAR, 2009 only and therefore, it is bound by the regulations of HCCAR and it cannot make policies which are in contravention to the subordinate legislation to Customs Act.

35. Per contra, the learned counsel for CONCOR submitted that CONCOR has a right to levy rent and warehouse charges or other charges under Section 63 of Customs Act. Therefore, the policy of CONCOR is not in violation of any legislation. It is further averred that Section 63 was in force when the denial of waiver of TSC was done by CONCOR and it was also in force when the present Writ Petition was filed before this Court. Section 63 was repealed by Finance Act, 2016 (28 of 2016) with

effect from 14.05.2016. Therefore, Section 63 will apply to the present facts and circumstances.

36. It is further averred by the learned counsel for CONCOR that since Regulation 6(1)(1) of HCCAR, 2009 starts with a subjective clause subjecting it to any other law in force at that time, therefore, due to Section 63 of Customs Act being in force at that time, the aforesaid Regulation would not be applicable to CONCOR and thus, its policy is not in contravention to any law.

37. It is apt to refer to Section 63 of the Customs Act at this stage which reads as under:

“63. Payment of rent and warehouse charges.-

- 1. The owner of any warehoused goods shall pay to the warehouse-keeper rent and warehouse charges at the rate fixed under any law for the time being in force or where no rates are so fixed, at such rate as may be fixed by the Commissioner of Customs.*
- 2. If any rent or warehouse charges are not paid within ten days from the date when they became due, the warehouse-keeper may, after notice to the owner of the warehoused goods and with the permission of the proper officer cause to be sold (any transfer of the warehoused goods notwithstanding) such sufficient portion of the goods as the warehouse-keeper may select.”*

38. Regulation 6(1)(1) of HCCAR, 2009 is provided as under:

“6. Responsibilities of Custom Cargo Service provider.-

- (1) The Custom Cargo Service provider shall:*
- (a)*

(1) Subject to any other law for the time being in force, shall not charge any rent, demurrage on the goods seized or detained or confiscated by the proper officer.”

39. After perusal of both the provisions reproduced herein above, it is apparent that the Regulation 6(1)(l) of HCCAR, 2009 provides that no rent, demurrage on the goods seized or detained or confiscated shall be charged subject to any other law in force at the time being. Therefore, this regulation is subject to Section 63 of Customs Act which provides for the right of warehouse keeper to levy rent and warehouse charges and Section 63 was in force when CONCOR denied the waiver of TSC to the Petitioner.
40. Further, the learned counsel for Respondent Nos. 2 and 3 have stated that the present case is squarely covered by the decision of Division Bench of this Court in the case of ***Trip Communication (supra)***. The conclusion drawn by the Division Bench in the aforesaid judgment is extracted hereinbelow:

“50. To sum up;

- (1) In cases where on conclusion of the adjudication proceedings there is no imposition of any fine, penalty, personal penalty and/or warning by the customs authorities:*
- (i) the Policy for Waiver would be applicable; and*
 - (ii) the importer would be entitled to be considered for its benefit when the goods were seized, detained or earlier confiscated; and*
 - (iii) waiver would be granted subject to other compliances.*
- (2) In cases where pending the adjudication proceedings, provisional release order is issued and a certificate is issued by the custom authorities, the goods would be released subject to furnishing of bond and/or security as may be prescribed that in case any fine, penalty, personal penalty and/or*

warning is imposed by the customs authorities, the Importer would pay the demurrage charges.”

41. Learned counsel for CONCOR submitted that since penalty and fine in lieu of confiscation was imposed upon the Petitioner, therefore, the Petitioner is liable to pay the TSC and CONCOR and the request for waiver of TSC is rightly denied. In view of the decision of Division Bench of this Court in ***Trip Communication (supra)***, this Court agrees with the argument advanced by the learned counsel for CONCOR.
42. However, the learned counsel for Petitioner avers that the penalty imposed was a nominal one and it was not imposed by any custom authority but was imposed by Settlement Commission which is an independent body constituted under Section 32 of the Central Excise Act, 1944. Therefore, the denial of waiver of TSC on account of policy as per which in the circumstances where penalty or fine has been imposed by the custom authorities no request for waiver will be entertained, will not be applicable to the Petitioner upon whom a nominal penalty was imposed by the Settlement Commission.
43. Under these circumstances, the question to be decided by this Court is that if a penalty is imposed by the Settlement Commission and not by any custom authority, then will it entitle the Petitioner for waiver of TSC?
44. At this stage, it would be apt to refer to the decision of a Single Bench of this Court in the matter titled as ***M/s S.K. Metal & Co. Vs Commissioner of Customs & Ors.***, W.P. (C) 6216/ 2001,

decided on 06.05.2016, wherein the Single Bench appropriately summarized the legal principles laid down by Supreme Court in its decisions in ***International Airport Authority of India v. Grand Slam International*** reported as (1995) 3 SCC 151 and ***Shipping Corporation of India Limited v. C.L. Jain Woollen Mills*** reported as (2001) 5 SCC 345. The summarized principles are as under:

“i. There is no provision in the Act that enables the customs authorities to direct a carrier of goods to waive demurrage charges or container charges even in terms of Section 45(2)(b) of the Act. That would be governed entirely by the contract between the importer and the carrier and the terms and conditions of the bill of lading, if any.

ii. Where the carrier is a corporation incorporated by a statute like for instance, the CWC, or the CCI or SCI then it would be bound by the provisions of the Act as far as its right to recover demurrage or container charges is concerned.

iii. Section 45(2)(b) of the Act, which enables the customs authorities to issue a detention certificate, cannot extend to directing the carrier or the owner of the container to waive the charges even where an order of confiscation or levy of penalty is ultimately held to be illegal by the courts.

iv. The only option is for the Central Government to make a request to the owner of the container or the space where the goods were stored to waive demurrage charges and if it is so conceded then to that extent the importer would be able to get some relief.”

45. The Hon’ble Supreme Court of India has categorically laid down in its aforementioned judgments that the custom authorities are enabled to issue detention certificates, but it cannot direct the Cargo Service Provider to waive the charges even where an order of confiscation or levy off penalty has been held to be

W.P.(C) 982/2015

Page 16 of 22

illegal by a court. It is further observed in the aforesaid judgements that the only option is for the Central Government to make a request to the owner of the container or the space where the goods were stored to waive demurrage charges and if it is so conceded then to that extent the importer would be able to get some relief. Therefore, if the Supreme Court does not allow the waiver of demurrage charges in a case where it has been held by a court of law that the confiscation of goods or levy of penalty was illegal, then there is no question that this Court can direct CONCOR to waive off the TSC when the Petitioner had clearly tried to evade custom duty by mis-declaration in its Bill of Entry.

46. Further, this Court cannot direct Respondent No. 2/ CONCOR to waive off the TSC in view of the decision of this Court in *Monika India Vs Union of India* reported as **2012 (283) ELT 33 (Del.)** wherein this Court observed that a writ of mandamus cannot be issued to the Cargo Service Provider directing it to waive off demurrage charges even on the ground that the importer/consignee was unable to clear the goods due to fault of the custom authorities. In the present case, the imported goods were confiscated as the imported goods were cleared from the customs office by mis-declaration and proper custom duty was not paid on them. So, in the present case, under no circumstance, this Court can pass a direction to CONCOR to waive off the TSC. The legal position culled out in *Monika India Vs Union of India* is as follows:

“(1) The customs authorities are entitled to examine the goods and draw samples to verify and determine the duty liability.

(2) The customs authorities can issue detention certificate or for good reasons may be called upon and directed by the Courts to issue detention certificate in respect of imported goods.

(3) Detention certificate issued by the customs authorities is not a mandate on the shipping company or warehousing companies. These corporations/companies are entitled to claim demurrage/container charges. These corporations cannot be compelled and mandamus cannot be issued to waive demurrage on the ground that the importer/consignee was unable to clear the goods due to fault of the custom authorities.

(4) Whether and in what circumstances customs authorities can be compelled and asked to pay demurrage to the warehousing companies/shipping companies, is a matter of considerable debate. Decision in the case of Sanjeev Woollen Mills (supra) states that in some cases customs authorities can be asked to pay demurrage to the warehousing company or shipping company. However, for this exceptional relief, grounds are required to be made out and established.”

47. Reference to Section 127F of the Customs Act, 1962 may also be made at this point which is reproduced below for the sake of convenience:

“127F. Power and procedure of Settlement Commission.-

(1) In addition to the powers conferred on the Settlement Commission under Chapter V of the Central Excise Act, 1944 (1 of 1944), it shall have all the powers which are vested in an officer of the customs under this Act or the rules made thereunder.

(2) Where an application made under section 127B has been allowed to be proceeded with under section 127C, the Settlement Commission shall, until an order is passed under sub-section (5) of section 127C, have, subject to the provisions of sub-section (4) of that section, exclusive jurisdiction to exercise

the powers and perform the functions of any officer of customs or Central Excise Officer as the case may be, under this Act or in the Central Excise Act, 1944 (1 of 1944), as the case may be, in relation to the case.

- (3) *In the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matter other than those before the Settlement Commission.*
- (4) *The Settlement Commission shall, subject to the provisions of Chapter V of the Central Excise Act, 1944 (1 of 1944) and this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers, or of the discharge of its functions, including the places at which the Benches shall hold their sittings."*

48. On perusal of Section 127F of the Customs Act, it is clear that the Settlement Commission is provided the power to impose any penalty or fine under the Customs Act only. Further, Section 127F of the Customs Act explicitly states that in addition to powers conferred on the Settlement Commission under Central Excise Act, 1944, the Settlement Commission also have all the powers which are vested in an officer of the customs under the Customs Act or the rules made thereunder. Therefore, the Settlement Commission is acting as a custom authority only while settling the cases under the Customs Act as it has all the powers that are vested in officer of the customs.

49. Under these circumstances, this Court does not agree with the contention of the learned counsel for the Petitioner that when the penalty is imposed by the Settlement Commission which is an

independent body constituted under the Section 32 of Central Excise Act, 1944, then the policy of CONCOR would not apply to the Petitioner. It is held that even if the penalty is imposed by the Settlement Commission then the same has been imposed by the Settlement Commission by exercising the power vested in it of the officer of the customs and thus, penalty imposed by the Settlement Commission would be treated as a penalty imposed by a custom authority.

50. Further, it is to be noted that CONCOR was established in 1988 under the Ministry of Railways to profitably satisfy customer's needs for high-quality, cost-effective logistics services. CONCOR spent huge expenditure in developing of ICD infrastructure to provide container/ cargo handling and storage services to the importers and exporters. CONCOR also ensures safety and security of the cargo while it is lying at ICDs. Concor incurs huge expenditure while performing its functions and its main source of revenue is container/ cargo handling and storage services rendered to customers.

51. If the contention raised by the learned counsel for the Petitioner would be accepted then it will cause huge losses to CONCOR which has been formed from public exchequers. Therefore, in the public interest and in view of the observations and judgments cited hereinabove, the contention of the learned counsel for the Petitioner that if the penalty has been imposed by the Settlement Commission then the policy of CONCOR for not entertaining the request of waiver of demurrage/ detention charges would not

be applicable, is not acceptable.

52. Further, in view of the observations made by the Division Bench of this Court in the matter titled as *International Lease Finance Vs Union of India*, W.P.(C) No. 6490/2018, decided on 27.03.2019, this Court is not inclined to allow the prayer (i) made by the Petitioner in the present Writ Petition in view of policy of CONCOR. The relevant portion of the judgment is extracted hereinbelow:

“21. Waiver of demurrage charges cannot be issued for the asking; therefore a court in judicial review cannot issue a direction without considering the reasons - if they are apparent, that underlie rejection of a request for exemption or waiver. After all, warehousing - and at the behest of the law (the Customs Act) is a commercial activity, for which the warehouseman or service provider (like CELEBI) invests with its resources, deploys manpower and creates infrastructure. The fee or consideration payable are determined by the duration or period for which warehousing is necessary, the kind of storage provided - including the safety and security to the goods. Unless the rules or relevant policy clearly mandate waiver from such services, courts cannot issue directions to such service providers. In this case, CELEBI relied on Clause 10.1.10 (b) to say demurrage waiver was precluded. In so saying, CELEBI was consistent with its policy.”

53. Further, this Court is not inclined to grant the prayer (ii) of the Writ Petition as the negligence and apathy of the Respondents cannot be adjudicated in a writ proceeding under Article 226 of the Constitution of India. This Court is also not inclined to allow the prayer (iii) of the Petitioner as in view of the discussion made hereinabove, CONCOR has not violated any provision of HCCAR, 2009.

54. In view of the detailed discussion herein above, the present Writ Petition is dismissed in the aforesaid terms. Pending application also stands disposed of accordingly. No order as to costs.

GAURANG KANTH, J

FEBRUARY 14, 2023

ng

