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IN THE HIGH COURT OF DELHI AT NEW DELHI*Date of decision: 4th January, 2023*

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W.P.(C) 16915/2022 and CM APPL. 53615/2022**CAPRICO INTERNATIONAL PTE LTD**

..... Petitioner

Through: Mr. Gaurav Kejriwal, Advocate (M:
9811100909).

versus

COMMISSIONER OF CUSTOMS AND ANR.

..... Respondents

Through: Mr. Ravi Prakash, CGSC with Mr.
Farman Ali and Mr. Aman Rewaria,
Advocates for R-1 (M: 7838669125).**CORAM:****JUSTICE PRATHIBA M. SINGH****Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.
2. This writ petition has been filed by the Petitioner - Caprico International PTE Ltd. seeking the issuance of a direction to Respondent No. 1- Commissioner of Customs for releasing the consignment under Bill of Lading No. HLCUTOR220708684 in favour of the Petitioner. The Petitioner further seeks cancellation of the previous bill of entry filed with the customs in favour of M/s Earth Wire Private Limited, and permit the Petitioner to file a new bill of entry as per new consignee.
3. The petition has been filed by the Petitioner - Caprico International PTE Ltd., a Singapore based company, which had entered into a sales contract on 22nd December, 2021 for Discarded and Non-Serviceable Motor Scrap (92% heavy moulding scrap) (*hereinafter referred as the "Goods"*) with one M/s Earth Wire Private Ltd – the Importer. Pursuant to the said

contract, an invoice dated 14th July, 2022 for a CIF sum of \$44057.13 was raised by the Petitioner against M/s Earth Wire. The goods were shipped from New York, USA to Delhi, India through Respondent No. 2- Hapag-Lloyd, Toronto. It is the admitted position that the goods were received at Mundra ICD, Sonapat on 27th August, 2022 vide bill of entry number 21481860 dated 25th August, 2022.

4. After receipt of the goods, the importer M/s Earth Wire did not pay the customs duty - hence, the goods were not cleared. Thereafter, some correspondence is stated to have taken place between the Petitioner and the importer, and instead of \$44057.13, the Petitioner agreed to give a trade discount of \$7000 which reduced the outstanding amount to \$37057.13. It is the case of the Petitioner that despite the said discount being given, the importer neither paid the Petitioner for the supply nor cleared the goods from the customs authority by paying the requisite duty. It is not disputed that apart from \$7350 being paid in advance, the importer paid no other amount after the goods were shipped.

5. Under such circumstances, the Petitioner took it upon itself to get the goods cleared and hence addressed a notice dated 1st December, 2022 to the importer and sought the payment of \$37057.13 and also damages amounting to \$10000, to which there was no reply. Thereafter, the Petitioner attempted to obtain all the original documents from the Bank. The Bank which was holding the documents on behalf of the importer returned the original documents to the Petitioner on 2nd December, 2022.

6. In this background, the Petitioner wrote a representation dated 3rd December, 2022 to the Respondent No. 1- The Customs Commissioner, seeking permission to release the goods so that the Petitioner can reduce the

losses, which were being caused to it. However, the customs authority did not permit the said release in favour of the Petitioner, hence the present petition has been filed seeking the following reliefs.

“(a) issue an appropriate writ, order or direction in the nature of mandamus directing the Respondents to release the consignment under Bill of Lading No. HLCUTOR220708684 in favour of the Petitioner and/or its new buyer without insisting on a no objection from the original consignee and also to cancel the previous bill of entry filed in customs, and permit the Petitioner to file a new bill of entry as per new consignee;

(b) issue a writ, order or direction in the nature of mandamus directing the Respondents to waive various charges, interest and penalties etc. levied upon the consignment under Bill of Lading No. HLCUTOR220708684 and for waiving of all detention charges/demurrage for delay in issuing amendment and release order;

(c) pass such further or other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”

7. Ld. Counsel appearing for the Petitioner submits that the facts and circumstances of the present case are covered by a judgment of this Court in ***Agrim Sampada v. Union of India, 2004 (72) DRJ 783*** wherein, in a similar situation, the goods were permitted to be cleared by the owner of the goods, as the importer had abandoned the goods. He further submits that the Petitioner is willing to pay the customs duty with a reasonable interest, which is charged, however, the demurrage ought not to be imposed upon the Petitioner as per this judgement.

8. Mr. Ravi Prakash, Id. CGSC appearing for the Respondent No. 1 submits that under Section 2(26) of the Customs Act, 1962, an importer is the owner of the goods. In the present case, the importer did not abandon the goods but, in effect, processed the release of the goods. Even the out-of-process formalities were undertaken, but thereafter, the importer did not clear the goods and also did not pay the customs duty or the detention/demurrage charges. He further relies upon the communication given to him by the Additional Commissioner (Legal), ICD, PPG, Delhi to state that the Bill of Entry of the goods have been assessed for customs duty amounting Rs.7,44,889/- and an interest of Rs.35,571/- (till date) is also liable to be paid. He further submits that detention/demurrage charges till 4th January, 2022 are to the tune of Rs.15,68,220/-.

9. It is brought to the notice of this Court by Id. CGSC that the present case has differentiating factors from *Agrim Sampada (supra)* case as in the said case, the importer did not undertake any process with the customs authority. In contrast, in the present case, the processing of documents was done by Respondent No. 2 at the instance of the importer. He also relies upon Section 46 of the Customs Act, 1962 to argue that once an entry is made on the customs automatic system of bill of entry, the detention/demurrage charges would be liable to be paid by the concerned importer.

10. The Court has considered the matter.

11. The situation in the present case is that though the out-of-charge process was undertaken by the importer way back in August, 2022, the said importer has not paid the customs duty and taken clearance of the goods. In effect therefore he has abandoned the goods. The importer has also not paid

the detention/demurrage charges and till date the goods are lying with the customs authority. The Petitioner has already received the original bill of entry and other documents from the Bank, which would therefore show that the title of the goods has, in fact, passed to the Petitioner.

12. Under Section 2(26) of the Customs Act, 1962 an importer would include an owner as also the beneficiary on its behalf. The said definition reads:

“(26) —importer, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer”

While the importer may have been the initial beneficiary, in view of the events which have transpired, after the initial bill of entry was drawn in favour of the importer, the ownership would now have to be recognised in favour of the Petitioner. It is the Petitioner who had supplied the goods and has now received all the original documents from the Bank. The Petitioner is willing to bear the customs duty and interest. However, the point to contest is the detention/demurrage charges between the parties.

13. The customs authority in the present case are clearly not to be blamed, inasmuch as the importer had not stayed quiet, but had in fact, processed the bill of entry and other documents with the customs authority and the duty was also assessed. Only thereafter does the importer appear to have lost interest in clearing the goods, for whatever reasons.

14. This Court is not concerned with the contractual dispute between the Petitioner and the importer. The only issue is whether the Petitioner is to be permitted to get release of the goods in these circumstances.

15. A perusal of the judgment in *Agrim Sampada (supra)* clearly shows that the original importer in the said case, who had to make payment on cash against delivery basis, had abandoned the same and under such circumstances, the Court had held that the party similarly situated as the Petitioner is entitled to present the original bill of entry to the customs authority, upon which the goods have to be cleared. The clear observation in the said decision is that the ownership would shift under such circumstances. Relevant observations are set out below:

“9. It has further been submitted on behalf of the petitioners that Section 2(26) of the Customs Act, 1962 defines "importer" to include the owner of the goods and any person holding himself out to be the importer at any time between the importation of the goods and the clearance of goods for home consumption and, accordingly the refusal to register the Bill of Entry of the Petitioner was contrary to law. He clearly stated that the amendment of the manifest under Section 30(3) of the Customs Act, 1962 was permitted by a competent authority and, this permission, being a quasi-judicial order, could not be withdrawn by the Deputy Commissioner of Customs without any appeal or review of the said order and the mere previous filing of a Bill of Entry could not be a valid ground for withdrawal of the permission to amend the manifest. The learned counsel appearing on behalf of the Petitioner also contended that as the goods were freely importable and as there was no allegation of under-valuation and that the Petitioner would at the time of clearance pay the appropriate duty on the goods, there was no question of considering the goods as being "offending" goods. He lastly, submitted that there is no evidence or allegation to the effect that the Petitioner and the said Shiv Ganga Organic Chemicals Ltd are related to each other in any manner.

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12. *In the case of UOI v Sampat Raj Dugar (supra) the Supreme Court considered the question of title of the goods in the case of imports and particularly where the importer abandons such goods and does not pay for or receive the documents of title. The Supreme Court held that where an importer abandons the imported goods and does not pay for them he cannot be treated as the owner of the goods. The Supreme Court held as under:-*

"19. We may first consider the question of title to the said goods. If we keep aside the provisions of law relied upon by the appellants viz., definition of 'importer' in Section 2(26) of the Customs Act, Clause 5(3)(ii) of the Imports (Control) Orders well as para 26(iv) of the Import-Export Policy, the position is quite simple. Since the second respondent did not pay for and receive the documents of the title she did not become the owner of the said goods, which means that the first respondent continued to be the owner.....

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.....The exporter is outside the country, while the importer, i.e. the licensee is in India. It is at the instance of the licensee that the goods are imported into this country. Whether or not he is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through Customs. This fiction is created for the proper and effective implementation of the said order and the Imports and Exports (Control) Act. The fiction however cannot be carried beyond

that. It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, that is, in a situation where he does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for suspension/cancellation of license. May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation. Condition (ii) in sub-clause (3) of Clause 5, in our opinion, does not operate to deprive the exporter of his title to said goods in such a situation."

In this view of the matter, applying this principle to the facts of the present case, we find that the goods were originally imported by Shiv Ganga Organic Chemical Ltd on cash against delivery basis. These goods landed in India sometime in February, 2001. The import of these goods was not contrary to law. However, the said

Shiv Ganga Organic Chemicals abandoned these goods and did not make any payment for the same. Clearly, the title in the goods in such a situation remained with the foreign supplier, i.e. Allied Deals, Singapore and it was well within its rights to enter into the transaction with the Petitioner. Since the goods were transferred to the Petitioner and the Petitioner held the document of title in respect thereof the Petitioner was clearly within the definition of "importer" as provided under Section 2(26) of the Customs Act and was, Therefore, entitled to present the bill of entry and to have the goods cleared for home consumption. The goods did not belong to Shiv Ganga Organic Chemicals Ltd. In these circumstances, the bill of entry sought to have been registered in the name of the Petitioner by the respondents and the Petitioner ought to have been permitted to clear the goods on the filing of such bill of entry and on payment of appropriate duty of customs."

16. Coming to the issue of demurrage charges, Id. Counsel for the Petitioner has vehemently contended that as per the decision in ***Agrim Sampada (supra)***, the Petitioner ought not to be saddled with the liability of demurrage. He submits that the judgment in ***Agrim Sampada (supra)*** relies upon the judgment of the Supreme Court in ***Union of India & Ors. v. Sampat Raj Dugar & Ors., AIR 1992 SC 1417***, which clearly holds that the demurrage charges under these circumstances cannot be saddled on the Petitioner.

17. The issue of payment of demurrage has been considered by several decisions of the Supreme Court and of this Court. On the question of demurrage, the Supreme Court in ***International Airports Authority of India ETC. v. M/s. Grand Slam International & Om ETC., 1995 SCC (3) 151***,

held that the demurrage would be liable to be charged even if there was fault on the part of the customs authority. The relevant portion of the said judgement is extracted below:

67. 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 area, due to fault on the part of the Customs authorities or of other authorities who might have issued detention certificates owning such fault.

18. In ***Union of India v. Sanjeev Woolen Mills, 1998 (9) SCC 647***, under special circumstances, the High Court's order directing the Appellants to bear detention/demurrage charges was not interfered with by the Supreme Court. Subsequently, in ***Shipping Corporation of India Ltd. v. C. L. Jain Woolen Mills & Ors. 2001 (5) SCC 345***, the Supreme Court clarified that there is no inconsistency between the decisions in ***Grand Slam (supra)***, and the Supreme Court clarified as under:

“10. We have also examined the decision of this Court in Union of India vs. Sanjeev Woolen Mills 1998(100)ELT323(SC) and we do not find any apparent inconsistency between the decision of this Court in Grand Slam and that of the Sanjeev Woolen Mills. In Sanjeev Woolen Mills, the imported goods were synthetic waste (soft quality), though the customs authorities detained the same, being of the opinion that they were prime fibre of higher value and not soft waste. On account of non-release, the imported goods incurred heavy demurrage charges but the customs authorities themselves gave an undertaking before the High Court

that in the event the goods are found to be synthetic waste, then the Revenue itself would bear the entire demurrage and container charges. Further the Chief Commissioner of Customs, later had ordered unconditional release of goods and yet the goods had not been released. It is under these circumstances and in view of the specific undertaking given by the customs authorities, this Court held that from the date of detention of the goods till the customs authorities intimated the importer, the importer would not be required to pay the demurrage charges. But in that case even subsequent to the orders of the customs authorities on a suit being filed by one of the partners of the importer-firm, an order of injunction was issued and, therefore it was held that for that period, the importer would be liable for paying the demurrage and container charges. The judgment of this Court in Sanjeev Woolen Mills, therefore, was in relation to the peculiar facts and circumstances of the case and the Court had clearly observed that the order in question is meant to do justice to the importer, looking to the totality of the circumstances and the conduct of customs authorities. Thus, we see no inconsistency between the ratio in Sanjeev Wollen Mills and the Judgment of this Court in Grand Slam. That apart, the judgment in Grind Slam was a three judge bench judgment. In the case in hand, as has already been stated earlier, the earlier judgment of Delhi High Court dated 9.9.94 in C.W.P. No. 1604/91, has become final, which entitles the importer to get the goods released without payment of the detention and demurrage charges. In the contextual facts, notwithstanding the judgment of the High Court, the goods not having been released, the impugned order and direction dated 18.1.99, cannot be held to be infirm in any manner. In the absence of any provision in the Customs Act, entitling the customs officer to prohibit the owner of the space, where the imported goods have been stored from levying the demurrage charges, levy of demurrage charges for non-release of the goods is in accordance with the terms and conditions of the contract

and as such would be a valid levy. The conclusion of the High Court to the effect that the detention of the goods by the customs authorities was illegal and such illegal detention prevented the importer from releasing the goods, the customs authorities would be bound to bear the demurrage charges in the absence of any provision in the Customs Act, absolving the customs authorities from that liability. Section 45(2)(b) of the Customs Act cannot be construed to have clothed the customs authorities with the necessary powers, so as to absolve them of the liability of paying the demurrage charges. In the aforesaid premises, we see no infirmity with the directions given by the Delhi High Court on 18.1.99. The goods in question, having already been directed to be released, without the payment of the demurrage charges, the importer must have got the goods released. Having regard to the fact situation of the present case, it would be meet and proper for us to direct the Shipping Corporation and Container Corporation, if an application is filed by the customs authorities to waive the demurrage charges. The appeal is disposed of accordingly.”

19. In ***Om Petro Chemicals v. Union of India, 2002(140)ELT353(Del)***, the Id. Division Bench of this Court held that the demurrage charges would not be liable to be paid if the party is not at fault. The relevant observations of the Id. Division Bench are as under:

“23. Would that however mean that the Petitioner must pay demurrage charges even though it is not at fault. Answer to the question must be rendered in negative. The decisions of the Apex Court Therefore are authorities for the proposition in certain situation, the court may direct the customs authorities to bear the demurrage charges. In the instant case the customs authorities still insisted that the goods were illegally imported. It sought to justify its stand even before this Court. This Court is not only a court of law but also a court of equity. In a situation of this nature we are of the opinion that this court may find

that in place of the importer or the consignee, the customs authorities should bear the charges. Once it is held that the Petitioner herein has not committed any illegality in importing the goods in question, in our opinion, it cannot ordinarily be saddled with the liability of payment of demurrage. The Petitioner in the fact situation of this case must be held to have been sinned against than sinning. In U.O.I. v. Sanjeev Woollen Mills, 1998(100)ELT323(SC), the Apex Court in the fact situation obtaining therein held that demurrage may not be paid by the importer.”

20. In the judgment ***Mumbai Port Trust v. Shri Lakshmi Steels and Ors., (2018) 14 SCC 317***, the Supreme Court again reiterated the position that when importers are guilty of delaying the matter, they cannot escape the liability of detention/demurrage charges. The relevant observations are as under:

*“46. We are, therefore, clearly of the view that even though there may be some delay on the part of the DRI and the customs authorities, **the Respondent-importers have also been guilty of delaying the matter and, therefore, they cannot claim that they are not liable to pay demurrage and detention charges.** We may, however, clarify that the Respondent-importers are free to approach the Mumbai Port Trust in terms of Section 53 of the Act for exemption and remission of demurrage and other charges and the Board may take a sympathetic view while considering the case of the Respondent-importers Under Section 53.”*

21. Thus, the position that emerges is that if the importer is at fault, demurrage would be liable to be paid.

22. Coming to the facts of the present case, between 28th August, 2022 till 23rd November, 2022, the goods continued to lie with the customs authority under the ownership of the importer, which was the original

beneficiary. The out-of-charge process has also been done on 15th September, 2022 pursuant to the documents submitted by the importer. The original documents were taken back from the bank only on 2nd December, 2022 upon the notice being sent by the Petitioner to the Bank. The entire matter was at large between September 2022 to December, 2022 between the two parties i.e. the Petitioner and the importer and the customs authority were not to blame. The Petitioner sent the first representation to the customs authority only on 3rd December, 2022 - thereafter, the present writ petition has been filed.

23. The question that now arises is whether the demurrage would be liable to be paid by the Petitioner. Insofar as the customs duty and the interest is concerned, the Petitioner is willing to pay the same. Accordingly, the customs duty and the interest assessed, as recorded above, shall be paid by the Petitioner to the custom authority.

24. On the question of demurrage, since the Petitioner received the original documents only in the first week of December, 2022, they could not have approached the customs authority prior to that. Between September 2022 to December, 2022 there seems to have been a complete lull between the parties and it is unclear what the importer intended to do with the goods. The goods continued to lie with the customs authority. However, there cannot be any explanation as to why the Petitioner waited so long, leading to incurring of demurrage.

25. These circumstances would clearly show that until December, 2022, the abandonment could not have been concluded by the Customs authorities, at the importer's instance as the out-of-process charge had already been done. Therefore, the customs authorities could not have presumed change in

ownership till December 2022. If the goods are not released to the Petitioner, the authorities would follow the procedure prescribed in law and recover the demurrage which they are obviously entitled to recover. However, the Petitioner herein is seeking release of goods due to change in ownership of goods on the strength of the original documents having been released in its favour and the Importer having not cleared the goods. The short question that arises is whether, the Petitioner can claim that it is not liable to pay any demurrage.

26. In view of the two decisions relied upon by Id. Counsel for the Petitioner including the *Agrim Sampada (supra)* and *Om Petro Chemicals (supra)*, though there maybe no illegality in the release of the goods in the favour of the Petitioner now, the Customs authorities cannot be made to bear the burden of detention/demurrage charges, especially when they proceeded in accordance with the provisions of the Customs Act, 1962. Prior to the ownership being transferred in favour of the Petitioner, the import or release of the goods in favour of the Petitioner, could not have been permitted by the customs authority under Section 2(26) of the Customs Act, 1962 itself. The facts in the said cases would be distinguishable as in the present case, inasmuch as between September, 2022 to December, 2022, the customs authority did not even have notice of the fact that the ownership was claimed to have transferred. Be that as it may, even the importer would be liable to be blamed in the present case, inasmuch as the importer, in effect, has processed the documents but has not cleared the goods after paying the duty.

27. Since the Petitioner is now seeking release of the goods, in the facts and circumstances of the present case and the legal position discussed above, the following directions are issued:

- a) The Petitioner shall pay the customs duty and interest as quantified above.
- b) Insofar as the detention/demurrage charges are concerned, since there is no explanation for the delay between September 2022 to December, 2022 and the first representation itself was made on 3rd December, 2022, the Petitioner would be liable to pay 50% of the detention/demurrage charges payable till 3rd December, 2022 as also demurrage charges for the period from 3rd December, 2022 till date.
- c) In order to quantify the exact amounts payable, the Petitioner is permitted to appear before the customs authority on 9th January, 2023 at 11:30 a.m. The Petitioner's representative shall appear before the customs authorities on the said date and time.
- d) The remedies of the Petitioner against the importer as also the remedies of the customs authority against the importer, who failed to clear goods M/s.Earth Wire, are left open.
- e) If the Petitioner wishes to avail of its remedies in accordance with law to challenge the present order, the Petitioner shall be allowed to clear the goods by paying the demurrage charges, as directed above, under protest.

28. The present petition, along with all pending applications, is disposed of in the above terms. Copy of the order be given *dasti* under signature of the Court Master.

PRATHIBA M. SINGH
JUDGE

JANUARY 4, 2023/dk/am
[Corrected and released on January 6, 2023]