

(2002) 03 AP CK 0029

Andhra Pradesh High Court

Case No: Writ Petition No. 10715 of 1988

Sarat Chatterji and Co., (VSP) Pvt.
Ltd., Visakhapatnam

APPELLANT

Vs

Visakhapatnam Port Trust,
Visakhapatnam and Another

RESPONDENT

Date of Decision: March 7, 2002

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2002) 4 ALD 641

Hon'ble Judges: Ghulam Mohammed, J

Bench: Single Bench

Advocate: V. Parabrahma Sastry, for Chandrasekhar Rao, for the Appellant; K. Srinivasa Murthy, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Ghulam Mohammed, J.

The writ petition is filed seeking a writ of mandamus directing the respondents not to collect demurrage charges on "sweepings" in question and consequently direct the authorities to release the petitioner's cargo relating to MV Daphe, MV Star Orient, MV Lantau Trader and MV Hoyo Maru mentioned in the auction sale notice dated 28-6-1988 issued by second respondent and also hold that demurrage charges demanded on "sweepings" in question are illegal and the public auction of cargo on the ground of unconnected or uncleared or abandoned cargo is uncalled for.

2. The brief facts of the case are that the petitioner is doing business as steamer agents, stevedores, clearing and forwarding agents, ship chandlers etc., and also unloading and clearing the bulk cargo like shredded scrap, hot briquetted iron

during July to December, 1986 in Visakhapatnam Port and continuing to do so, for various ships arriving in Visakhapatnam. "Sweepings" are inevitable in the process of handling bulk cargo or bagged cargo and the "sweepings" are collections by act of sweeping. It also represents the cargo, which could not be cleared along with original cargo since the particles of original cargo, leaked, embedded in the subsoil, contaminated or scattered. Further, the left overs or leakages forming "sweepings" could not be handled or cleared within "free storage time".

3. The "sweepings" in question form part of the cargo, which was unloaded and cleared by the petitioner through four ships namely Daphe, Star Orient, Lantau Trader and Hoyo Maru. It is averred that the petitioner found particles of iron scrap which are technically known as "sweepings" and the petitioner therefore addressed a letter dated 27-12-1986 to the second respondent- Traffic Manager, Visakhapatnam Port Trust for clearance of "sweeping" from NS Dump Area in the port. The petitioner handled 70,000 MTs of iron scrap since July, 1986 and the said cargo is the last sweepings of the cargo discharged and stacked. The petitioner further sought permission to clear the sweeping collection to their leased area for screening and ultimate despatch. The petitioner had shifted the complete "sweepings" to different places in the port to avoid hindrances for movement of other cargo.

4. The petitioner further submits that when goods are traced by the petitioner as "sweepings", a letter dated 27-12-1986 was written to the second respondent to enable the petitioner to remove "sweepings" without further payment on the ground that the said goods formed part of manifested cargo for which port charges were already paid. Therefore, the petitioner is not liable for payment of demurrage charges etc., after the said letter.

5. The petitioner further submits that as per Clause (1) of Scale of Rates, 1985 dealing with demurrages which are charges for use of transit space, the demurrage charges shall be levied after the expiry of free days and "sweepings" are treated separately in the Scale of Rates, 1985 as against the original cargo already cleared.

6. The second respondent sent a letter dated 3-1-1987 informing that the point has no objection to clear iron scraps lying at T-7 shed. The petitioner wrote a letter dated 5-1-1987 inviting the attention of the authorities to scale "D" "goods of free wharfage" in the Scale of Rates, 1985 and requested the respondent to confirm that no wharfage charges are payable on the "sweepings". The second respondent replied vide letter dated 8-1-1987 stating that no wharfage charges shall be levied on sweepings collected from the wharf space provided if it is -part and parcel of the manifested quantity for which wharfage charges are paid and that demurrage charges shall be levied if the same is cleared beyond free period. The second respondent further stated that "the demurrage charges are payable on the sweepings in question."

7. While so, the port authority gave notice dated 12-8-1987 stating that the goods are lying uncleared in transit space and therefore, the petitioner was requested to clear the goods immediately duly paying the demurrage charges. The petitioner sent reply dated 17/20-8-1987 informing that the demurrage charges are not payable on "sweepings" according to Scale of Rates, 1985. The second respondent sent a communication dated 31-8-1987 insisting on payment of demurrage charges. Ultimately, the port authorities issued auction notice dated 28-6-1988 to hold auction on 19-7-1988. Questioning the same, this writ petition is filed.

8. The counter-affidavit is filed stating that there will be no "sweepings" in question in respect of bulk cargo and the material left in the port is part and parcel of the manifested quantity of the cargo unloaded from the four ships. Out of the manifested quantity, the petitioner received the cargo leaving balance in the transit accommodation. In fact, by retaining the said cargo in transit accommodation, much space is being occupied by the petitioner's cargo and by not removing the cargo in question within the free period, the petitioner is trying to convert the transit space as his storage accommodation to the detriment of shipping operations. It is averred that there cannot be any "sweepings" in respect of the bulk cargoes, but there may be sweepings in bagged cargo as there will be some drop-outs from the bags while handling the same and that there is a duty cast on the petitioner to collect all the material in the bulk cargo while handling the same and collecting all the material remained from time to time. Further, the petitioner categorically agreed that the cargo in question is the original manifested quantity of the cargo and as the petitioner removed some cargo within the free period leaving portion in the transit accommodation, the said cargo left was subjected to the payment of demurrage charges. It is also stated that the cargo left is part of the manifested quantity of cargo and there will be no "sweepings" in respect of bulk cargo, the alleged "sweepings" being part of the main cargo, free storage period will equally apply to the facts of the case. Since the petitioner paid the wharfage charges on the manifested quantities, the demurrage charges are payable on the cargo in question beyond the free period till they are moved from the port premises. The sweepings cannot be identified since the same is part of the main cargo left uncleared. The "sweepings" are not treated separately in the Scale of Rates, 1985 and the classification provided therein is with regard to payment of wharfage charges but not demurrage charges. The second respondent vide letter dated 3-1-1987 clearly stated that the Port Trust has no objection to clear the cargo lying at T-7 shed on payment of demurrage charges. It was also clarified vide letter dated 8-1-1987 to the petitioner that no wharfage charges shall be levied on the sweepings collected from wharf if it is part and parcel of the manifested quantities for which wharfage charges are paid and that demurrage charges shall be levied if the same is cleared beyond free period. It is categorically stated that u/s 61 and 62 of the Major Port Trusts Act, 1963, the Port Trust is empowered to bring the goods for sale by auction whenever the goods are lying uncleared for more than two months and in the

instant case, since the goods were not cleared by the petitioner within the stipulated time duly paying port charges such as demurrage charges etc, the goods in question were brought for sale invoking the provisions of the said Act. Further, the petitioner had filed a suit in O.S. No.457 of 1987 on the file of II Additional Subordinate Judge, Visakhapatnam, relating to the payment of demurrage charges.

9. The writ petitioner filed reply affidavit mainly contending that sweepings were originally part of the manifested quantity of the cargo, but as a result of transit operations, they are fall out of the bulk cargo and then cease to be a part of the cargo; that the sweepings were not visible to the eyes for removal along with the manifested cargo and the request for clearance of "sweepings" was much later to the handing over of the entire site back to the port after clearing the manifested cargo. The sweepings are undetectable in the regular operation and consequently Weighment Certificate was issued. Further, the "sweepings" depreciate and decay due to natural conditions and they cease to exist both in their form and quality.

10. Learned Counsel for the petitioner, Mr. V. Parabrahma Sastry contends that there is no statutory sanction for the collection of demurrage charges in respect of sweepings lying in T-7 shed and there is no levy of demurrage charges in case of sweepings as per the Scale of Rates, 1985. He contends that there are drop-outs from the boxes and there is need to appoint a Commissioner and there is a positive proof in favour of petitioner as per the averments in the counter-affidavit as well as the subsequent correspondence. Lastly, he contended that in the impugned notice dated 28-6-1989, no particulars have been furnished and it does not indicate the rate of levy and no quantity is mentioned and the notice suffers from serious infirmities. Learned Counsel submits that when the correspondence of the Port Trust and the averments are taken into consideration, there is no determination and adjudication with regard to levy in question. The levy of demurrage charges on "sweepings" is unauthorised as the Scale of Rates, 1985 do not authorise the Port Trust to levy and demand the demurrage charges which are excluded from payment of said charges.

11. Learned Counsel for the petitioner has drawn my attention to the judgment of [Rajasthan Kisan Sangthan Vs. State of Rajasthan and Others](#), for the proposition that Article 226 can be invoked to prevent injustice and when there is material available on record, the petitioner cannot be driven to civil Court at this length of time particularly when the writ petition is pending for more than 12 years and it would be unjust to direct the petitioner to avail common law remedy. Learned Counsel also contends that the writ Court can exercise jurisdiction on the basis of material on record and also exercise its equitable jurisdiction to prevent injustice.

12. On the other hand, learned Standing Counsel for respondents Mr. K. Srinivasa Murthy, contended that it is not open to the petitioner to come to the Court when the port authority is demanding demurrage charges since petitioner had occupied the space for retaining the scrap and thus preventing the authority from moving the cargo and causing hardship and when the petitioner does not clear the cargo, the

Port Trust is empowered to levy and demand the demurrage charges after the free period. He contended that there cannot be "sweepings" in case of manifested cargo and the "sweepings" may arise in respect of bagged cargo as there will be some dropouts. He has drawn my attention to the meaning of "sweeping" and according to the Oxford Concise Dictionary, the word "Sweeping" included that which is embedded in subsoil and not visible. Learned Standing Counsel further contends that the petitioner is involved in commercial activity and the matter arises out of the contract between the parties. The petitioner gave an offer and the Port Trust having accepted the offer, was utilising the services of the petitioner and this Court cannot investigate into the questions of fact with regard to determination of goods retained attracting demurrage charges, space occupied by those goods and preventing the port authorities from moving other cargo as the port is carrying a public service. The petitioner has not taken any steps to take back the goods within the free period and thereafter, retaining the same in the port area attracts demurrage charges as per Scale of Rates, 1985. In this connection, learned Standing Counsel has drawn my attention to Sections 42 and 43 of the Major Port Trusts Act which deal with the performance of services by the Board or other person and the responsibility of the Board for loss etc., of the goods. Section 48 of the said Act deals with the scales of rates for services performed by Board or other person and the same reads as under: "(1) Every Board shall from time to time frame a scale of rates at which and a statement of the conditions under which, any of the services specified hereunder shall be performed by itself or any person authorised u/s 42 at or in relation to the port or port approaches:

(a) xxx

(b) xxx

(c) carnage or portrage of goods on any such place.

(d) Wharfage, storage or demurrage of goods on any such place;

(e) Any other service in respect of vessels, passengers or goods, excepting the services in respect of vessels for which fees are chargeable under the Indian Ports Act.

(2) Different scales and conditions may be framed for different classes of goods and vessels."

13. When the cargo is unloaded in bags, there is a possibility of sweepings, but in the instant case, there is no question of sweepings inasmuch the bulk quantity of 70,000 MTs of iron scrap is to be cleared and hence, the petitioner was asked to pay the demurrage charges.

14. With regard to the impugned auction notice, learned Standing Counsel contents that the details of unclaimed/ uncleared/abandoned goods have been enclosed to

the said notice including the description and quantity and the question of appointment of Commissioner in the present situation is inappropriate inasmuch as after a lapse of about 12 years, the Commissioner cannot undertake the task.

15. Learned Standing Counsel has relied upon the decision of the Apex Court in [The Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others](#), while dealing with Section 62 of Madras Port Trust Act, 1905 held that the suit for demurrage after clearance of goods, not against the principal owner, is not maintainable. The relevant portion of the judgment reads as under:

"The Board's power to frame the scale of rates and statement of conditions is not a regulatory power to order that something must be done or something may not be done. The rates and conditions govern the basis on which the Board performs the services mentioned in Sections 42, 43 and 43-A. Those who desire to avail of the services of the Board are liable to pay for those services at prescribed rates and to perform the conditions framed in that behalf by the Board. Whether the services are from the importer's point of view optional in the sense that he may or may not require them or whether the importer has no option save to avail himself of the basic services of the Board as for landing and keeping the goods in the transit area, the services have to be paid for at the scale of rates prescribed by the Board. In such matters, where services are offered by a public authority on payment of a price, conditions governing the offer and acceptance of services are not in the nature of bye-laws. They reflect or represent an agreement between the parties, one offering its services at prescribed rates and the other accepting the services at those rates. As, generally, in the case of bye-laws framed by a local authority, there is in such cases no penal sanction for the observance of the conditions on which the services are offered and accepted. If the services are not paid for, the Board can exercise its statutory Hen on the goods or file a suit."

16. In the above factual background and having regard to the nature of activities undertaken by the Port Trust particularly rendering of services and in view of the nature of transactions between the petitioner and the respondent Port Trust, which involve commercial elements, the common law remedy of instituting a suit is a proper and effective remedy, to lead the evidence and to determine the fact as to whether the goods in question are "sweepings" and whether they can be excluded from payment of demurrage charges or attract the demurrage charges for retaining in T-7 shed.

17. In the facts and circumstances of the case, I do not find any merit warranting interference under Article 226 of the Constitution of India particularly in view of the fact that the petitioner had already instituted a suit with regard to levy of demurrage charges in respect of manifested cargo and the remaining items left at T-7 shed which have not been cleared. Therefore, I do not find any merit to invoke the writ jurisdiction in view of the peculiar facts and circumstances of the case. The writ petition is misconceived and it is accordingly dismissed. No order as to costs.