

---

**(2014) 07 CAL CK 0041**

**Calcutta High Court**

**Case No:** A.P.O. No. 22 of 2014 and W.P. No. 836 of 2013

Srikanta Bagla

APPELLANT

Vs

Commissioner of Customs (Port)

RESPONDENT

---

**Date of Decision:** July 9, 2014

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 11

**Citation:** (2014) 310 ELT 283

**Hon'ble Judges:** M.K. Chaudhuri, J; Girish Chandra Gupta, J

**Bench:** Division Bench

**Advocate:** Jayanta Mitra, Sr. Advocate, Achinta Kr. Banerjee and Sk. Faridullah, Advocate for the Appellant; R.N. Das, Sr. Advocate and T.M. Siddiqui, Advocate for the Respondent

---

### **Judgement**

@JUDGMENTTAG-ORDER

1. The subject matter of challenge in this appeal is a judgment and order dated 18th December, 2013 by which the learned Trial Court allowed the writ petitioner to re-export the goods being six consignments of furnace oil/fuel oil claimed to have been imported by the writ petitioner. The learned Trial Court, however, added that such re-export shall be permitted by the Customs authorities subject to satisfaction of the claims, if any, of the Port authorities. The petitioner was granted liberty to recover such amount by initiating appropriate proceedings against the authorities including Customs authorities in case he was so advised. To be precise, the order passed by the learned Trial Court reads as follows:-

"This Court, therefore, directs the Customs Authority to allow the aforesaid consignments forming the subject matter of the writ petition to be re-exported to the foreign seller as the said seller has signified its consent to take back those consignments, if necessary, after drawing up the further samples which may be required for the purpose of the testing, in the event, the materials for testing are found to be insufficient to arrive at the correct conclusion. The entire exercise shall

be completed by the Customs Authorities within four weeks from date.

The petitioner shall intimate the Customs Authorities the date and the venue for re-export of those consignments. The port authorities, after intimated by the Customs Authorities, shall allow the consignments to be re-exported to the foreign seller upon due satisfaction of its claim, as applicable and if the port is in monetary claim in respect of the consignments the same would be paid by the petitioner and the petitioner shall be entitled to recover the said amount by initiating the appropriate proceeding against the authorities before the court of competent jurisdiction."

Mr. Mitra, learned Senior Advocate appearing for the writ petitioner/appellant, submitted that the writ petitioner's contention before the Trial Court was that goods were wrongfully detained by the Customs authority, which resulted in a huge liability towards CFS charges, containers' detention charges, insurance charges, etc., for no fault on the part of the petitioner as would appear from Paragraphs 10 to 18 of the writ petition and the ground No. III contained therein. This question the learned Trial Court refused to decide on the following grounds:-

"In the present case, those samples have already been drawn by the Customs Authorities and have been sent to the laboratory for its testing whether the goods are hazardous or toxic. Both the respondent authorities as well as the petitioner denies their responsibilities for such detention, as according to the respondents, because of the recalcitrant and inactive approach of the petitioner the samples could not be drawn immediately whereas the petitioner says that the respondent authorities have shown their dormant and lethargic approach in not sending the samples to the laborites as indicated in Schedule VII to the said Rules. The port authorities are not parties to this proceeding. It is still uncertain whether any claim is made towards the detention and/or demurrage charges by the port authorities.

This Court, therefore, does not intend to decide the said issue which is still born."

2. During the pendency of this appeal, an order dated 17th February, 2014 has been passed by the Commissioner of Customs which reads as follows:-

"ORDER

21. In compliance of the Hon"ble High Court Order dated 18th December, 2013, I allow re-export of goods imported through Bills of Entry No.:-(1) 9140249, dated 28-1-2013, (2) 9154178, dated 29-1-2013, (3) 9092625, dated 22-1-2013, (4) 9560474, dated 13-3-2013, (5) 9487049, dated 5-3-2013, and (6) 9484148, dated 5-3-2013, against payment of a penalty of Rs. 10 Lakhs (Rupees Ten Lakhs) in terms of Customs Circular No. 100/2003, dated 28-11-2003 read with Rule 17 of the Hazardous Waster (Management, Handling and Transboundary Movement) Rules, 2008.

Date: 17-2-2014

Sd/-

Commissioner of Customs (Port)

Customs House: Kolkata"

3. Mr. Mitra submitted that the order dated 17th February, 2014 has also been challenged in this appeal by filing a supplementary affidavit.

4. Mr. Das, learned Senior Advocate appearing for the Customs Department, submitted that the order dated 17th February, 2014 cannot be challenged for the first time before the Division Bench that too, in connection with an appeal arising out of the order dated 18th December, 2013 which is the basis of the order dated 17th February, 2014. He submitted that the order dated 17th February, 2014 can only be challenged in accordance with law and no grievance against that order can be entertained in this appeal.

5. Mr. Mitra contended that in the event the appellant is to be relegated to a fresh proceeding, a finding should be made that the order directing the writ petitioner to pay the dues of the Port authority, if any, is bad because the principal question as to whether the delay occurred due to laches on the part of the Customs authority was not considered by the Trial Court. He contended that the case of the writ petitioner has always been that the delay is on account of Customs authority and the Customs authority is liable for all consequences including the detention charges in whatever form they may have arisen.

6. We have considered the rival submissions and are of the opinion that the bar contained in Section 11 of the Code of Civil Procedure shall not apply to this case because the learned Trial Court did not decide the issue. Unless an issue has been heard and finally decided there can be no res judicata. In that view of the matter, it is clarified that the aforesaid order directing the writ petitioner to pay the port charges shall not stand in the way nor shall constitute res judicata in deciding the issue as to whether the delay was on account of the laches on the part of the Customs authority and in deciding the issue as regards the consequences thereof. With these observations the appeal is disposed of.