

(2016) 03 CAL CK 0168
CALCUTTA HIGH COURT
Case No: W.P No. 1047 of 2006.

Donald Macarthy Pte Ltd. -
Petitioner @HASH The Board of
Trustees For The Port of Kolkata

APPELLANT

Vs

RESPONDENT

Date of Decision: March 2, 2016

Acts Referred:

- Constitution of India, 1950 - Article 226
- Major Port Trusts Act, 1963 - Section 53

Citation: (2016) 3 CalHCN 257 : (2016) 2 CalJ 571 : (2017) 1 WBLR 312

Hon'ble Judges: Arindam Sinha, J.

Bench: Single Bench

Advocate: Mr. Samit Talukdar, Sr. Advocate and Mr. A.K. Dey, Advocate, for the Petitioner; Mr. Tilak Bose, Sr. Advocate, Mr. Shiv Shankar Banerjee, Mr. Arik Banerjee and Mr. B. Chakraborty, Advocates, for the KoPT; Mr. R. Bharadwaj, Advocate, for the Customs

Final Decision: Disposed Off

Judgement

Arindam Sinha, J. - The challenge in this writ petition is directed against an order signed by the Trustees of the Kolkata Port Trust on 16th December, 2005 by which they found no waiver of demurrage charges as payable by the petitioner and the Customs, could be granted.

2. Mr. Talukdar, learned Senior Advocate appearing on behalf of the petitioner submitted that a document being part of guidelines for waiver of demurrage charges of import cargo was relied upon by the Board to reject the claim of the petitioner for waiver when such document was not disclosed to the petitioner and the case of the petitioner was for waiver of demurrage charges on exportation of goods. Mr. Talukdar relied upon Section 53 of the Major Port Trusts Act, 1963 to submit, the Board in effect did not apply its mind to the case for waiver made by the

petitioner.

3. Mr. Bharadwaj, learned Advocate appearing on behalf of the Customs submitted the said authority had also applied for waiver of demurrage charges said to be payable by it. On a reading of paragraph 9 in the impugned order as well as the statements made in the affidavit in opposition, filed and copy served today, the case of the said authority was it did not have notice of the hearing and thus was unrepresented.

4. Mr. Bose, learned Senior Advocate appearing on behalf of the Kolkata Port Trust, submitted his client was entitled to exercise powers under Section 61 of the said Act to deal with the goods as provided thereunder. By orders passed in an earlier writ petition and appeals arising therefrom, his client had been restrained from so dealing with the goods. Ultimately, when this writ petition was moved, there was order dated 5th September, 2006 made, inter alia, restraining his client from disposing of the goods of the petitioner till the disposal of the writ petition. Mr. Bose urged that there be adjudication and finding of Court regarding his contention that exercise of power by the Port Trust under Section 61 of the said Act was not subject to or could not be pended by reason of an application for waiver made under Section 53 thereof.

5. He next submitted the impugned order was a good order and required no interference. He relied on several judgments of the Supreme Court for the declarations of law by that Court regarding the necessity of finding that prejudice must be shown to have been caused by non supply of a document before an order or proceeding could be set aside on that ground. The decisions are :-

i) **Panchmahal Vadodara Gramin Bank v. D.M. Parmar, reported in (2011)15 SCC 310;** and

ii) **Burdwan Central Cooperative Bank Limited v. Ashim Chatterjee, reported in (2012)2 SCC 641.**

6. Mr. Bose next relied on a judgment of the Supreme Court in the case of **G.B. Mahajan & Ors. v. Jalgaon Municipal Council & Ors., reported in (1991)3 SCC 91.** Argument made regarding exercise of discretion was recorded in paragraph 37 of the said judgment, which is reproduced below:-

"37. It was urged that the basic concept of the manner of the development of the real estate and disposal of occupancy rights were vitiated by unreasonableness. It is a truism, doctrinally, that powers must be exercised reasonably. But as Prof. Wade points out, "The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires.

The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority'

He submitted the exercise of discretion by the Board in rejecting the claim for demurrage was properly made and there was no cause for interference as the same could not be said to be extravagant or capricious or not an exercise made judiciously.

7. Mr. Bose also relied on another decision of the Supreme Court in the case of the **Board of Trustees of the Port of Bombay v. Indian Goods Supplying Co. reported in AIR 1977 SC 1622**, to portions of paragraphs 10 and 14 thereunder, which are reproduced below:

"10)..... As the scale of rates are framed by virtue of the statutory powers conferred on the Board under Section 43 and as the rates have been approved by the Central Govt. under Section 43B the rates have the force of law and cannot be questioned. Taking into account the hardship to the importers certain concession has been given but the legality of the rates which are being levied according to law cannot be questioned"....."

"14) The position therefore is that even though the delay in clearing the goods was not due to the negligence of the importer for which he could be held responsible yet he cannot avoid the payment of demurrage as the rates imposed are under the authority of law the validity of which cannot be questioned. The claim cannot be resisted as there is no evidence that the delay was due to any act of the Port Trust or persons for whom the Port Trust is responsible."

8. The facts leading upto the petitioner and the Customs applying for waiver of demurrage charges are matters of record in an earlier and this writ petitions and appeals as well as briefly outlined in the impugned order itself. It appears the petitioner who is a company incorporated under the relevant laws of Singapore and having its office there, had sent goods being copper wires that an importer wanted to import. The goods arrived in Kolkata Port but the importer did not turn up to file Bill of Entry. In such circumstances, the petitioner had sought for reshipment of the goods, to take it back. The goods stood landed in the custody of the Kolkata Port Trust. The earlier writ petition was filed by the petitioner which resulted in a direction for reshipment. The respondent in that writ petition was the Customs who was resisting reshipment of the goods where the importer had not turned up. In that writ petition the Port Trust was not a party yet was aggrieved since there was

direction for reshipment without payment of demurrage charges. Pursuant to the Port Trust resisting the removal of goods from their custody without payment of demurrage charges, it applied for being added as a party to that writ petition which was then reheard, orders made and appeals preferred therefrom. It was submitted, by orders in appeal, apportionment of liability to pay demurrage charges had been made between the petitioner and the Customs. Interim orders of restraint on the goods being dealt with in the meantime were passed and, it appears, accepted by the Port authority. Hence the first point urged is answered being that such orders, at least the order dated 5th September, 2006 made in this writ petition, was made in aid of the reliefs claimed but without adjudication of the point argued now, which point does not appear to have been raised then. Since the challenge in the writ petition has been heard and the interim order stood accepted, the point need not detain this Court any further.

9. For the purpose of adjudication of the challenge in the writ petition, the impugned order must be seen in context of the above facts. Paragraphs 6, 7 and 8 in the impugned order records the submissions made by the petitioner, which are reproduced below:

"6. In support of their application for waiver of demurrage, DMPL vide their letter dated 29.9.2005 stated the following :-

a) The scale of Rates of KoPT had been framed for the purpose of imposing demurrage on goods lying in the port area in order to ensure that no person was allowed to use the port area as his own warehouse.

b) Demurrage was not an absolute liability but was always based on fault. There must be a wilful attempt on the part of the person to utilise the port area as his own warehouse for storing the goods before demurrage could be imposed on him.

c) Person who was not at fault and/or was always ready and willing to take delivery of the materials from the port area but was prevented by Govt. Dept. from doing so, could not be saddled with demurrage charges.

d) Before arrival of the goods at Kolkata Port, attempts were made by them to have the goods re-shipped as soon as the Indian purchaser had expressed its intention not to take delivery of the goods.

e) Had DMPL been allowed to re-ship the goods and the goods not been detained on frivolous grounds by the Custom authority, demurrage would not have accrued at all.

f) The very fact that the Detention Certificate was issued by Custom Authority, would show that DMPL was not at fault at all. Due to laches and/or negligence on the part of Custom Authority in not allowing to re-ship the goods, port demurrage accrued.

g) DMPL become the victim of the circumstance and in spite of its best intention to have the goods re-shipped, they could not do so.

h) Since accrual of demurrage was not because of any fault/negligence on the part of DMPL, demurrage charges may be waived fully.

7. On 16.12.2005 i.e. the day of hearing, on behalf of DMPL, Shri S Talukdar, Advocate, A.K. Dey, Advocate, Om Prakash Chowdhury, Advocate and B. Dey, Advocate were present. The above Ld. Advocates, on behalf of DMPL, narrated the history of the case and reiterated the issues raised by DMPL in their letter dated 29.09.2005. In addition to this, they submitted that their case fell under special category and deserved special consideration for granting waiver of demurrage which had been accruing due to no fault of their client. Accordingly, they prayed for full waiver of demurrage payable by their client and in case, the same could not be acceded to by the Trustees, at least demurrage in excess of four months demurrage accrued on the consignments, might be waived as a special case, in terms of Section 53 of the MPT Act.

8. During submission, it was also pointed out by the Ld. Advocates of the petitioner that -

(a) KoPt was not responsible for accrual of demurrage.

(b) The Hon"ble Supreme Court in various judgments held that the person liable to pay demurrage charges, as per rates framed under the statute, could not avoid such liability even if, a third party including the Municipal Authority and other statutory authorities was at fault for accrual of such demurrage and that Port Trust was entitled to charge demurrage for the imported goods in this custody and to make importer/consignment liable for the same.

(c) The Hon"ble Supreme Court in various judgments held that the power u/s-53 of the MPT Act of the Board of Trustees for granting waiver of demurrage was a judiciously and not arbitrarily. In other words, waiver could only be granted when there was a special case."

From a perusal of the points taken and submissions made as appearing from the paragraphs reproduced above, this Court does not find any reference to the guidelines for waiver of demurrage charges on import cargo.

10. The reasoning in the impugned order would appear from paragraph 9 of the same as is reproduced below:

"9. The application made by the petitioner dated 29.9.05, application made by the Custom Authority dated 28.9.05, documents and records placed as well as the oral submission made by the advocates for the petitioner have been considered by the Board. It reveals that :-

a) The goods in question were imported to India but at present, the exporter has been allowed by the Hon"ble Court to re-ship the cargo. For the re-shipment of the cargo, the same would attain the status of "export cargo". At present, there is no guideline for waiver of demurrage charges on export cargo but there is an approved guideline for waiver of demurrage charges on import cargo (a copy of the same is printed at Appendix-I). For the purpose of considering the instant applications for waiver of demurrage charges, the aforesaid approved guideline will be relevant as the accrued demurrage is for the import leg only. As per the said guideline, port may waive demurrage only when the port is not able to deliver the goods in time. Neither the exporter nor Custom authority has ever indicated any lacunae on the part of KoPT for unusual long detention of the cargo in the Port. On the other hand, para 2(a) or para 2(g) of the aforesaid guideline might have been relevant in the instant case but, as the goods were neither detained by Custom Authority for special examination nor were confiscated by them, the aforesaid two paragraphs of the said guideline are not applicable.

b) On the other hand, paragraph-2(ii) of the aforesaid guidelines states that the Trustees may consider cases for waiver of demurrage charges if they have reasons to believe that the detention of goods is not due to the fault of the importer/consignee. On perusing the judgement dated 3.5.2005 the Hon"ble Justice K.J. Sengupta it is seen that DMPL was given liberty by the Hon"ble Court on 06.01.1997 for reshipment of the goods by paying 50% of the demurrage accrued at that time without prejudice but, the same was not availed of by DMPL. To mitigate the loss, DMPL should have availed of the same. In fact, demurrage accrued upto 06.01.1997 was Rs.1,15,14,518/- and 50% of the same was Rs.57,57,259 only. Considering the conduct of both Customs and DMPL, Hon"ble Court has already passed orders for levy of a portion of demurrage accrued on the consignments on both the parties, payable to KoPT. When both the parties were at fault, paragraph 2(ii) of the said guideline is also not applicable in the instant case.

c) Paragraph 10 of the said guideline states that in case in the opinion of the Port Trust, an application for waiver of demurrage charge not covered by para-2 above, deserves consideration due to any special circumstances, the Board of Trustees may consider such cases and take an appropriate decision where the special reasons should be recorded in writing. In the instant case, Trustees are of the opinion that the applications of the Custom Authority and DMPL do not deserve consideration due to any special circumstance."

11. This Court on perusal of the contentions of the petitioner, the Customs apparently not represented in the hearing granted, finds the Board chose to not to exercise power under Section 53 of the said Act and rejected the claim for demurrage on the reasons given in the impugned order. Section 53 of the said Act is reproduced below:

"53. Exemption from, and remission of, rates or charges

A Board may, in special cases and for reasons to be recorded in writing, exempt either wholly or partially any goods or vessels or class of goods or vessels from the payment of any rate or of any charge leviable in respect thereof according to any scale in force under this Act or remit the whole or any portion of such rate or charge so levied."

The said Section does not indicate the person(s) liable to pay the demurrage, which might be exempted or remitted in exercise of discretion provided thereunder.

12. The Board, as it appears from the reasons recorded in the impugned order, had considered the claim of the petitioner with reference to the guidelines for waiver of demurrage on import cargo, there being no guideline for export cargo. The contention of the petitioner however did not have any reference to itself as importer or to the guidelines for waiver of demurrage charges on imported cargo. The reasoning given in the impugned order proceeded to treat the goods as imported cargo at least for a while of the entire period that it lay in the custody of the Port Trust and still lies. The Board said the approved guidelines (for import cargo) will be relevant as the accrued demurrage is for the import leg only. There is, however, no reasoning or finding in the impugned order, that would lead this Court to infer therefrom, the Board was of the opinion the petitioner was the importer of the goods. The facts were to the notice of the Board. That the petitioner could not be said to be an importer is also apparent from the impugned order.

13. The first judgment dated 21st February, 1994 by A.N. Ray J., by which the earlier writ petition of the petitioner was dealt with though not disposed of, carried the following passage as is reproduced below:

"Mr. Ghosh submitted that if I were to accept the contentions of the petitioner, I would to speak have to throw the Customs Act, into the Ganges. I do not agree. It might be that, for a case like the present, where, after filing of the manifest, a sender of the goods from outside India, changes his mind about sending the goods at all into this country, there exists no specific section in the Customs Act, on the basis of which the officials can give effect to such a change of mind on the part of the foreign exporter, even when such change of mind is not illegal or extraneously motivated. The bureaucratic machinery, in such a situation, will not be able to function, because none of the standard operations quite fits the special situation. It is exactly in these cases that the writ court steps in for relief, and uses its all pervasive power to grant a just solution to the parties who deserves the same, notwithstanding the non-existence of any standard or prototype procedure in the department, on the basis of which such relief could be granted on a mechanised basis. The writ court is free to mould the relief so as to do justice in accordance with our constitution."

14. This Court finds that in rejecting the claim of the petitioner, upon having entered into an exercise to consider the same, the Board relied on guidelines for waiver of

demurrage charges on imported cargo on recording there is no guideline for waiver of demurrage charges on export cargo. Inference can be drawn that the petitioner was taken by surprise on the reliance of such guidelines as they had come prepared and did submit without reference to the same. Prejudice appears to have been caused to the petitioner and the demonstration of it is borne out from the face of the impugned order itself. The Board did not invite the petitioner, as does not appear from the impugned order, to make submissions with reference or regard to the guidelines for waiver of demurrage on imported cargo. Apart from that the Board having itself found no guideline was in place to cover the case of the petitioner, went on to say its case did not deserve consideration due to any special circumstance. On the top of that record bears the finding by this Court in the petitioner's earlier writ petition, as would appear from the passage reproduced above, that so far as the Customs was concerned their "bureaucratic machinery, in such a situation, will not be able to function, because none of the standard operations quite fits the special situation".

15. For the reasons aforesaid, the impugned order cannot be sustained and the same is set aside. The respondent no.1 shall revisit the claim of the petitioner for waiver of demurrage charges. Such direction is being made because the said respondent itself chose to consider the same under Section 53 of the said Act inasmuch as the claim of the petitioner was not rejected in limine. Mr. Bose submitted, at this juncture, the claim was entertained pursuant to an order passed by a Division Bench of this Court. Be that as it may, the respondent will give notice of hearing to both the petitioner and the Customs and upon hearing them dispose of their respective claims within eight weeks from the date of communication of a copy of this order made to it. The writ petition is disposed of.