

Board of Trustees of the Port of Bombay

Vs

Jai Hind Oil Mills Co. and Others

Civil Appeals Nos. 4483 And 4484 of 1986

(K. N. Singh, E. S. Vankataramiah JJ)

09.01.1987

JUDGMENT

VENKATARAMIAH, J. -

1. These appeals by special leave are filed against the order dated June 26, 1986 passed in Appeal No. 512 of 1986 in Writ Petition No. 1007 of 1986 and the order dated June 26, 1986 in Appeal No. 535 of 1986 in Writ Petition No. 1424 of 1986 of the High Court of Bombay. Since these two are connected matters, they are disposed of by this common judgment.

2. The facts of these two cases are these. The appellant in both these appeals is the Board of Trustees of the Port of Bombay (hereinafter referred to as 'the Port Trust') and respondent 1 in both these appeals is a partnership firm by name M/s. Jai Hind Oil Mills Company. Respondent 1 imported 5 consignments of propylene of 10 metric tons each in January, 1986 by S. S. Maribor. The general landing date of the said consignments was January 20, 1986 and the last free date in respect of them was January 23, 1986. Thereafter the said consignments were incurring demurrage. The bills of entry were submitted by respondent 1 to the customs authorities in the same month. Disputes arose between the 1st respondent and the customs authorities with regard to the basic customs duty payable in excess of 32.50 per cent. (as goods were imported from the Republic of Korea which was a developing country), with regard to loading the assessable value with customs duty for calculation of the additional duty and with regard to loading the CIF value with the landing charges. Not being satisfied with the contentions of the customs authorities the 1st respondent filed a writ petition in Writ Petition No. 122 of 1986 for the issue of certain directions to the customs authorities with regard to the levy of customs duty. In that writ petition on January 21, 1986 the High Court passed an interim order which directed the customs authorities not to insist on payment of the customs duty in dispute pending hearing and disposal of the writ petition on respondent 1 furnishing a bank guarantee to the extent of the 90 per cent. of the disputed amount of duty in respect of two other items in favour of the Collector of Customs. Thereafter some correspondence ensued between respondent 1 and the customs authorities in connection with the description of the above goods. It would appear that while the Bill of Lading and the Invoice described the goods as 'Propylene' the marks on the consignments indicated that they contained 'polypropylene'. Respondent 1 was asked to explain the discrepancy by the customs authorities. There was also some dispute raised as regards the invoice price. Respondent 1 could not, however, clear the goods from the Port of Bombay. Thereafter Respondent 1st filed another Writ Petition No. 519 of 1986 for the issue of a direction to the customs authorities to permit it to clear the consignments. On April 2, 1986 the learned Single Judge of the High Court of Bombay who heard the said petition passed an order allowing the respondent 1 to clear the consignments on furnishing an Import Trade Control bond for the value of the consignments calculated at the rate of US \$ 737 per metric ton and

furnishing a bank guarantee of a nationalised bank in favour of the Collector of Customs, Bombay to the satisfaction of the Prothonotary & Senior Master, High Court, Bombay, for a sum equivalent to the difference in the value between US \$ 715 and US \$ 735 per metric ton without prejudice to the rights and contentions of the respondent 1. The said order provided that the customs authorities could continue their investigation and adjudicate upon the duty payable by the respondent 1. On the basis of the above order respondent 1 was allowed to withdraw the writ petition with liberty to file a fresh petition, if required. Since there was a delay in the clearance of the consignments in question and respondent 1 had become liable to pay demurrage to the Port Trust, respondent 1 addressed a letter to the Collector of Customs, Bombay asking him to issue a Detention Certificate stating that the goods had been detained for bona fide Import Trade Control formalities so that it could claim the remission of demurrage payable to the Port Trust. Respondent 1 followed up the above letter by another Writ Petition No. 1007 of 1986 which was filed on or about the April 17, 1986 against the customs authorities for the issue of a writ directing them to issue a Detention Certificate in respect of all the 5 consignments. On the April 24, 1986 the learned Single Judge passed a final order directing the customs authorities to issue a Detention Certificate to respondent 1 respondent giving an undertaking to the court that it would pay the amount, if it failed in Writ Petition No. 122 of 1986. Pursuant to the order dated April 24, 1986 passed in Writ Petition No. 1007 of 1986 respondent 1 gave an undertaking to the court that it would pay the amount upon its not succeeding in Writ Petition No. 122 of 1986. On May, 21, 1986 the Port Trust received a letter dated May 19, 1986 from the Assistant Collector of Customs in which it had been stated inter alia that five Detention Certificates had been sent along with the said letter. Actually no enclosures were received along with the said letter. But later on they received two Detention Certificates in respect of two out of the five consignments on that day. They related to two bills of entry bearing Nos. 3133/219 and 3133/220. On the same day the Docks Manager of the Port Trust received a letter from the clearing agent of respondent 1 asking the Port Trust to grant the remission of demurrage in view of the Detention Certificates issued by the customs authorities. Since the Port Trust was not a party to any of the writ petitions, referred to above, and no bank guarantee or demand draft had been furnished by respondent 1 covering the 80% amount of the demurrage fees, the Port Trust wrote a letter dated May 30, 1986 to respondent 1 asking respondent 1 to give a bank guarantee to the effect that in the event of respondent 1 losing Writ Petition No. 122 of 1986 it would pay to the Port Trust, Bombay the entire amount of remission along with interest at 15% per annum. When the aforesaid letter was sent, the Port Trust was not aware of the order dated April 2, 1986 passed in Writ Petition No. 519 of 1986. Thereupon, on June 12, 1986 respondent 1 and its partner Sham Lal Kishnani, who is respondent 2 herein filed another Writ Petition No. 1424 of 1986 in the High Court against the Port Trust for quashing the communication dated May 30, 1986, referred to above, under which the Port Trust had asked the respondent 1 to furnish the bank guarantee or a demand draft to the extent of 80% of the demurrage fees claimed by the Port Trust and for compelling the Port Trust to honour the Detention Certificates issued by the customs authorities pursuant to the order dated April 24, 1986 and to permit the clearance of the goods without payment of demurrage and without insisting upon the furnishing of a bank guarantee or a demand draft, as stated above. They also asked for an interim order to the effect that pending hearing and final disposal of the said writ petition, the Port Trust should forthwith honour the Detention Certificates issued by the customs authorities and allow the clearance of the goods without payment of demurrage and without insisting on the bank guarantee or the demand draft. In that writ petition an interim order was passed on June 17, 1986 as prayed for by the respondent 1. Thereafter the Port Trust was advised to file an appeal before the Division Bench against the order dated April 2, 1986 passed in Writ Petition No. 519 of 1986 and the order dated June 17, 1986 passed in Writ Petition No. 1424 of 1986. While the Port Trust was in the process of getting the said appeals made ready for filing by their advocates, respondent 1

threatened the Port Trust with contempt proceedings by its letter dated 20th June, 1986. Immediately after the receipt of the said letter, the Port Trust lodged the Appeal No. 512 of 1986. By an order dated June 26, 1986 the appeal filed against the order dated April 2, 1986 passed in Writ Petition No. 1007 of 1986 was summarily dismissed. The said order, however, stated as under :

It is, however, clarified that it is clear from the impugned order dated April 24, 1986 that the undertaking pertains to the demurrage charges payable to the Port Trust, if the respondents 1 and 2 (petitioners) failed in Writ Petition No. 122 of 1986 on the footing that no valid Detention Certificate could have been issued in that event.

Mr. Chinoy contends that the Detention Certificate could not be issued, if in the adjudication proceedings the petitioners are found at fault and the question of the petitioners giving an undertaking to provide for this does not appear to have been present in the mind of the learned Judge when the order was passed.

Liberty to the appellants to seek further clarification and/or orders on this question from the learned Single Judge.

3. The appeal filed against the order dated June 17, 1986 in Writ Petition No. 1424 of 1986 was numbered as Appeal No. 535 of 1986. The said appeal was also summarily dismissed on June 26, 1986. As the Port Trust was advised to file an appeal in this Court by special leave, the Port Trust did not apply to the learned Single Judge for clarification as suggested in the order passed in Appeal No. 512 of 1986.

4. It may be mentioned at this stage that the remaining three Detention Certificates relating to Bills of Entry No. 3133/221, 222 and 223 were received by the Port Trust from the customs authorities on July 3, 1986. Two out of the five consignments were cleared by respondent 1 on July 3, 1986 and the remaining three consignments were cleared by respondent 1 on July 5, 1986 on payment of an aggregate amount of Rs. 49,510.50 for the charges of the Port Trust in accordance with the order dated June 17, 1986 passed in Writ Petition No. 1424 of 1986 as against a total amount of Rs. 3,53,514.75 due to the Port Trust for wharfage and demurrage charges up to the dates of the clearance of goods. Thus a sum of Rs. 3,04,004.25 in respect of wharfage and demurrage charges of the said five consignments remains unpaid to the Port Trust. Aggrieved by the two orders passed on June 26, 1986 in Appeal No. 512 of 1986 and Appeal No. 535 of 1986 the Port Trust has filed these two appeals by special leave.

5. The principal contention urged in both these appeals is that the High Court should not have directed the customs authorities to issue Detention Certificates without the Port Trust being made a party to the writ petition and in any event without passing an order duly providing for the payment of the wharfage and demurrage charges due to the Port Trust on the event of respondent 1 failing in its contention in Writ Petition No. 122 of 1986. It is urged that a mere undertaking given in favour of the High Court agreeing to pay the amount was not sufficient security for the amount due to the Port Trust in the event of the respondent 1 being held to be the party in default. It is further contended that the High Court committed an error in directing the respondent 1 to give a bank guarantee only in respect of the customs duty payable by respondent 1 in the event of its writ petition being dismissed and in not making a similar order directing respondent 1 to furnish a bank guarantee in respect of the wharfage and demurrage charges payable to the Port Trust in the event of respondent 1 being ultimately held as the party in default.

6. The Port Trust is constituted under the Major Port Trusts Act, 1963 (hereinafter referred to as 'the Act'). Under Section 5 of the Act every Board constitute under it is declared to be a body corporate having perpetual succession and a common seal with power, subject to the provisions of the Act, to acquire, hold or dispose of property and it may by the name by which it is constituted, sue or be sued. The affairs of the Port Trust are managed by the Board of Trustees and committees appointed by it in accordance with the provisions of the Act. It is thus an independent statutory body and not just a department of government. Under Chapter VI of the Act the Board of Trustees of a Port Trust is empowered to impose and recover rates at ports, for services rendered by the Port Trust or other persons at the port under its jurisdiction. Sections 48 to 65 of the Act which are in Chapter VI of the Act deal with the said power of the Board of Trustees. Section 48 authorises a Board from time to time to frame a scale of rates at which and a statement of the conditions under which, any of the services specified thereunder shall be performed by itself or any person authorised by it at the port or port approaches. Clause (d) of Section 48 specifically empowers the Board of impose rates in respect of wharfage, storage or demurrage of goods on any such place. Every scale of rates and every statement of conditions framed by the Board under the foregoing provisions are required to be submitted to the Central Government for sanction and will have effect when so sanctioned and published by the Board in the Official gazette. It is, however, provided in Section 53 of the Act that the Board of Trustees in special cases and for reasons to be recorded in writing, may 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 the Act or remit the whole or any portion of such rate or charge so levied. The Port Trust has fixed the scale of rates charged at the docks. A booklet containing the said rates which are revised up to January 10, 1985 is produced before the court. Section III of the said booklet which commences at page 14 thereof contains the "Docks scale of rates' fixed by the Port Trust. In consultation with the customs authorities, the Port Trust has provided for the grant of concession in the matter of payment of demurrage charges on the issue of Detention Certificate by the customs authorities. Section III-A(c) of the said booklet deals with the demurrage fees chargeable by the Port Trust. Proviso (d) to the said clause (c) states that the goods detained by the Customs Department for special examination 'involving analytical or technical tests other than the ordinary process of appraisement' will be exempt from demurrage fees during such period of detention as may be certified by the Collector of Customs to be not attributable to fault or negligence on the part of importers or exporters plus two working days and that the certification by the customs will be given by endorsement on relative duplicate copies of Bills of Entry or Shipping Bills. On the suggestion of the Customs Department the Port Trust has accepted to allow concession in the matter of demurrage charges to the extent indicated in paragraph 4.10 of the note which is enclosed as Ext. 'B' to the Special Leave Petition (Civil) No. 8466 of 1986. It reads thus :

4.10. The best course seems to be to charge a rate per day which corresponds to our minimum charge for handling, storage, care and custody of the goods after the expiry of the free days. Wharfage constitutes handling costs plus storage charges for a period of four days. Deducting handling costs, the balance represents storage charges for a period of four days. It is estimated that, excluding the handling costs, storage charges per day are equal to 20% of total wharfage. It is, therefore, suggested that for the entire period of certified detention we may retain per day 20% of the wharfage to cover the services referred to herein.

7. The above concession is extended by the Port Trust in appropriate cases where Detention Certificates are issued by the customs authorities. The customs authorities have laid down the procedure for issue of Detention Certificates and the current procedure in regard to the issue of

Detention Certificates is embodied in the Bombay Customs House Public Notice No. 111 dated July 29, 1985. Paragraph 2 of the said notice sets out the circumstances under which a regular Detention Certificate could be issued by the Customs House for facilitating the importers to get remission of demurrage charges. They are as under :

- (a) Where the goods are detained by Customs House for bona fide operation of Import Control formalities without any default on the part of the importers.
- (b) Where the goods have been released on caution (a regular Detention Certificate and not a recommendatory letter).
- (c) Where, the goods are detained in the Custom House pending test report and the facility of clearance against provisional assessment has not been allowed. Such Detention Certificates will be issued on merits for the period for which the goods were detained for the purpose.
- (d) Where the goods are detained for PHO formalities, the certificate will cover the period stretching between the date of drawal of the sample by the PHO and date of his test results, and
- (e) In cases where samples have been drawn from the imported consignments by the Assistant Drug Controller for ensuring compliance with the provisions of Drugs and Cosmetics Act, 1940 and where the Assistant Drugs Controller is of the opinion that release cannot be allowed against a Letter of Guarantee pending tests.

8. The said public notice also states that Detention Certificates will not be issued in the following types of cases :

- (a) Time taken by the Custom House Laboratory for analytical/chemical testing of samples drawn from the consignments, since the facility of clearing the goods on bond in terms of Section 18 already exists.
- (b) Samples drawn from the imported consignments by the Assistant Drugs Controller for ensuring compliance with the provisions of Drugs and Cosmetics Act, 1940 and for being forwarded to the Central Drug Laboratory, Calcutta, as the importers can avail of the facility of clearing the goods against letters of guarantee and need not wait till the receipt of the test report.

The facility of allowing clearance of goods against letters of guarantee is extended only on the specific recommendations of the Asst. Drugs Controller on the Bill of Entry in each case.

- (c) The period taken for mutilation of woollen rags in the docks.
- (d) Cases where goods are detained in the ordinary course of appraisement such as for determination of the tariff classification of goods or their assessable value in terms of Section 14 of the Customs Act.

9. It is agreed between the customs authorities and the Port Trust that no Detention Certificate would, however, be issued by the Customs Department if there has been any default on the part of

the importer or exporter. It is thus clear that in the event of the importer or exporter being at fault, he would not be entitled to any concession in the matter of demurrage charges. He has to pay whatever is payable in accordance with the 'scale of rate' charged at the docks as fixed by the Port Trust.

10. The power of a Port Trust to fix rates of demurrage and to recover the same from an importer or exporter (although the question of an exporter paying demurrage arises rarely) under law and to show concession as regards demurrage charges in certain specified cases is recognised by this Court in the Trustees of the Port of Madras v. M/s Aminchand Pyarelal ((1976) 1 SCR 721 : (1976) 3 SCC 167 : AIR 1975 SC 1935) and in the Board of Trustees of the Port of Bombay v. Indian Goods Supplying Co.

((1977) 3 SCR 343 : (1977) 2 SCC 649 : 1977 Tax LR 2026). These decisions are no doubt based on the relevant laws which were in force at the material time. But the decisions are still relevant insofar as cases arising under the Act because the Act also contains provisions more or less similar to the statutory provisions considered in the said decisions. Demurrage charges are levied in order to ensure quick clearance of the cargo from the harbour. They are always fixed in such a way that they would make it unprofitable for importers to use the port premises as a warehouse. It is necessary to do so because congestion in the ports affects the free movement of ships and the loading and unloading operations. As stated earlier, the Port Trust shows concession to the party concerned in certain types of cases.

11. In the instant case the High Court by the order passed in the writ petition to which the Port Trust was not a party directed the customs authorities to issue Detention Certificates in respect of the consignments in question. In doing so while the High Court had safeguarded the interests of the customs authorities by its earlier orders by directing respondent 1 to furnish a bank guarantee in respect of the duty payable to them, in respect of the demurrage charges payable to the Port Trust the High Court merely directed an undertaking to be given in favour of the High Court. In the ordinary course, the High Court should have directed respondent 1 to furnish bank guarantee in respect of the demurrage charges payable to the Port Trust in the event of respondent 1 being held to be in default ultimately.

12. It is, however, to be observed that before compelling the customs authorities to issue a Detention Certificate, the High Court should have issued notice to the Port Trust which was vitally interested in securing its own interests as regards the demurrage charges recoverable by it under law. This was necessary because on the production of the Detention Certificate issued by the customs authorities the Port Trust was under an obligation to permit the clearance of the goods without payment of full demurrage charges. If ultimately the party concerned is found to be at fault and becomes liable to pay the full demurrage charges the Port Trust may not be in position to recover such full demurrage charges from the party concerned, since it would have no longer any lien as provided by Section 59 of the Act on the goods which are already cleared. The Port Trust being a body corporate constituted under the Act is entitled to be heard by the Court before any order which affects its interests prejudicially is passed. This case serves as an illustration to what is stated above. The Port Trust has been asked to permit the clearance of goods in respect of which demurrage charges of Rs. 3,53,514.75 are payable in the event of respondent 1 being held liable in law to pay the full demurrage charges. The orders passed by the High Court in the proceedings to which the Port Trust was not a party which had the effect of prejudicially affecting the interests of the Port Trust would not be binding on it in view of the violation of the principles of natural justice. The High Court erred in not imposing any condition on respondent 1 for protecting the interests of the Port Trust

even in the writ petition to which it was a party. The impugned orders are contrary to the public notice issued by the customs authorities as well as the rules of the Port Trust.

13. Having regard to the peculiar circumstances of this case in which the goods have already been cleared, the orders of the High Court of Bombay against which these appeals are filed are, therefore, to be modified appropriately in order to protect the interests of the Port Trust. Accordingly, at the conclusion of the hearing of these appeals we passed an order on December 16, 1986 before reserving the appeals for judgment directing respondent 1 to furnish within eight weeks a bank guarantee of a nationalised bank in favour of the appellant for due payment of Rs. 3,04,004.25 to the appellant on demand, without any demur, being the balance of wharfage and demurrage charges in the event of respondent 1 not succeeding ultimately in Writ Petition No. 122 of 1986 and on failure to furnish such bank guarantee within eight weeks to pay in cash Rs. 3,04,004.25 to the appellant forthwith. This shall be the final order in these appeals.

14. These appeals are disposed of in the above terms. The customs authorities shall complete the adjudication proceedings as expeditiously as possible and in any event within March 16, 1987.

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