

Brief Note on Judgment dated 27<sup>th</sup> July, 2017 of the Supreme Court of India in

**Mumbai Port Trust v Shri Lakshmi Steels & Others**

Civil Appeals No. 9831-32 of 2017 with 9833-34 of 2017

Respondent firms viz. M/s Shri Lakshmi Steel & M/s Inder International were engaged in import of cold rolled coils (CRC) and sheets. During December 2015 Respondents had imported various consignments of CRC out of which 10 consignments were disputed by the Department of Revenue Intelligence (DRI) and were put on hold by the Customs on the orders of DRI dated 14.12.2015. DRI was of the view that the respondents had been importing consignments in violation of notifications issued by the Customs in order to evade provisional duty and therefore required 100% examination regarding description, thickness, quality, width etc. Accordingly two examinations were conducted on the instructions of Customs on different occasions, where the first confirmed the goods as described in the Bill of Entry however the results of second inspection were different as eight of 10 consignments were found to be Hot Rolled Coils (HRC) and remaining two were found to be CRC. In the meanwhile, on the request of DRI, the Custom authorities asked the respondents to produce PD Bond for release and were further asked to furnish Bank Guarantee for 20% of the provisional duty. However, the respondents did not avail this opportunity. Respondents vide letter dated 01.02.2016 requested the Commissioner Customs to issue Detention Certificate in respect of the consignments which was rejected by the DRI, as DRI had earlier written to customs to draw samples again (for third inspection). Finally on 23.02.2016, the goods were seized and the respondents were directed to seek provisional release of goods. On 05.03.2016, DRI permitted provisional release of goods but the goods were not released due to one reason or the other. The respondents moved the Punjab & Haryana High Court, where the court passed interim order but subsequently the petitions were withdrawn. However during this time, on 22.04.2016, the shipping line issued notice to the respondents informing them about the proposal of auctioning the goods in order to recover the demurrage charges. Respondents moved the High Court for the second time where the High Court directed that the goods be sent to Steel Authority of India for testing. The test revealed that the goods appeared to be cold rolled coils but the thickness of the coil was found at variance with the declaration given. This time too, the High Court passed interim order for release but the order was set aside by the Supreme Court and the High Court was requested to dispose the writ petition at an early date and in the meanwhile, the auction of the goods was stayed during pendency of the writ petition.

High Court allowed the writ petition holding that the respondents were harassed by the DRI and further held that the respondents were not liable to pay any demurrage and the detention charges and the same were to be borne by the DRI or Customs. Further the High Court directed that the goods be released on payment of duty and awarded costs of Rs. 50,000 each to the respondents.

Revenue and Mumbai Port Trust moved the Supreme Court assailing the order passed by the Hon`ble High Court and contended that the High Court erred in relying upon the 2009 Regulations framed by CBDT and Customs being a sub-ordinate regulation and cannot supersede the provisions of Major Port Trusts Act and the Regulation 6(1) is subject to other laws including Major Port Trust Act. Reliance was placed on section 160(9) of the Customs Act. Port Trust further contended that it is entitled to recover statutory tariff including the demurrage charges from the respondents and it cannot be directed to release the goods without payment of such charges even by the courts or the government. Still further it was contended by the Port Trust that the High Court also erred in holding that under section 45(1) of the Customs Act the Port Trust is the custodian of the Customs Department. On behalf of Customs and DRI it was contended that High Court erred in directing the Customs and DRI to pay the demurrage and detention charges. It was submitted that the officers did not act mala fide as they had specific intelligence input and even if the intelligence inputs were not found correct, the action cannot be said to be mala fide. On the other hand, the Respondent importers relying upon section 128 of Major Port Trusts Act and 2009 Regulations contended that once detention order has been passed by the Customs, Port Trust has to waive the demurrage. Relying further upon the 2009 Regulations, it was contended that Port Trust

was not entitled to claim demurrage for the period when the goods were under the detention of the Customs and even if the Port Trust is held entitled then the liability should be fastened on Customs and DRI.

As per the judgment, two issues arose before the Supreme Court viz. (1) Whether any direction could be given to the Mumbai Port Trust to waive the demurrage charges and; (2) Whether the liability to pay the demurrage/detention charges in respect of the imported goods could be fastened upon DRI/Customs.

The judgment of the High Court was set aside by the Supreme Court which held as follows;

- a. The court referred to earlier judgments passed in *Port of Madras v Aminchand Pyarelal*, *Port of Bombay v Indian Goods Supplying Co.*, *Port of Bombay v Jai Hind Oil Mills Co.* where the issue of collection of demurrage charges, rates by the ports even in cases where the importer was not responsible for any delay in removing the goods, was discussed. It was observed that the Supreme Court had been taking the view that the Boards of Trustees of Ports which are a creature of statute are entitled to charge demurrage and other charges even for those periods of delay where the importer was not at fault and including delay on account of detention of goods by the Customs which detention may have been found to be unjustified later. The Court also relied upon the judgment in *International Airport Authority of India v Grand Slam International* which related to power of Customs to issue detention certificates under section 45 of Customs Act where it was held that section 45 of Customs act did not affect the rights of International Airport Authority to collect charges from the importer.
- b. On the issue of reliance placed by the High Court on the judgments of Supreme Court in *Shipping Corporation of India v C.L Jain Wollen Mills* and *Union of India v Sanjeev Woolen Mills*, it was held that the directions given in *CL Jain's* case were given in the peculiar facts of the case as the judgment did not deal with Major Port Trusts Act. And the law laid down in *Sanjeev Woolen Mills* had no bearing on the facts of the present case as the proceedings therein arose on account of contempt and the judgment passed by Delhi High Court was not challenged where the High Court had directed the Customs to pay demurrage and detention charges. It was further observed the order of the High Court in *Sanjeev Woolen Mills* had become final and the Supreme Court had refused to interfere with the order in contempt proceedings.
- c. On the issue of applicability of section 45 of Customs Act read with the 2009 Regulations, as relied upon by the High Court, the Supreme Court observed that the 2009 Regulations were framed under section 157 of Customs Act and Mumbai Port Trust being a major port has the power and authority to levy rates including demurrage charges under section 47-A of Major Port Trusts Act. At the same time, it was observed that section 160(9) of Customs Act clearly provides that provisions of Customs Act shall not in any manner affect constitution and power of any Port Authority in a major port which would include the right of the major port to levy demurrage and other rates. It was held that 2009 Regulations being framed under Customs Act and are in the nature of subordinate legislation and therefore cannot in any manner affect the power and authority of Major Port Trust. It was further held in para 35 that “*Neither the Regulations nor can the provisions of the Customs Act impinge or in any manner affect the statutory power of the Major Port Trusts to levy rates under the Act...*”.
- d. On the issue of whether directions could be issued to the DRI/Customs to pay the demurrage charges to the Port Trust and detention charges to the Shipping Line, while referring to the earlier decisions which make it clear that it is the importer who is liable to pay the demurrage charges even though not at fault. As far as detention charges are concerned, it was observed that these arise out of a private contract between the importer and the carrier and therefore High Court, in writ proceedings, could not have directed the DRI/Customs to pay the detention charges to the shipping line. It was further held that DRI/Customs can be directed to pay the demurrage/detention charges only when it is proved that the action of DRI/Customs is absolutely mala fide and gross misuse of power. It was also held that “*Even if an importer feels that it has been unjustly dealt*

- with, it must clear the goods by paying the charges due and then claim reimbursement form Customs Authority.”*
- e. On the issue of mala fides on the part of Customs/DRI, it was observed that the High Court did not give any specific finding of mala fides. On the finding given by the High Court on the issue of losses suffered by the Respondents on account of delay on the part of Revenue, it was held that there may be some delay on the part of DRI and Customs, the Respondents were also held to be guilty of delaying the matter. However the Respondents were granted liberty to approach the Mumbai Port Trust under section 53 of Major Port Trusts Act for exemption and remission of demurrage and other charges.

### Practical Insight

It is always one of the established best practices to give proper description of goods in Bill of Entry, Bill of Lading, Insurance Policy and should as far as possible match with the details given in Invoice. Any mismatch of description can lead to delay in clearance of cargo and could result in additional costs for the importer. In some cases where claims may arise then it can also lead to insurance disputing the claim of the insured. In case of delay in releasing the cargo on account of detention by the customs, the law is now amply clear that the Importer will have to bear the detention and/or demurrage charges however, the importer can always approach the port for revision of charges under section 53 of Major Port Trust Act (Reproduced below). In so far as the demurrage charges levied by the liner/transporter in case of containerized cargo, the same would depend upon the terms and conditions agreed between the liner/transporter. As is clear from this case and the cases decided earlier, issuing of Detention Certificate by the Customs would not automatically absolve the importer of its liability to pay demurrage/detention charges.

**S.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.

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