WP NO. 818 OF 2014

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Srikant Bagla
Vs.
Commissioner of Customs & Ors.

For the petitioners:-	**Mr. Jayanta Mitra, Sr.Advocate & Advocate General** **Mr. A.K.Banerjee** **Mr. Sk. Faridullah**
For Respondent (No.8):	**Mr. Soumya Mazumdar** **Mr. Dibyendu Chatterjee** **Mr. Siddhartha Roy**
For Respondent (No.9):	**Mr. P.D. Mukherjee**
For Customs Authority:	**Mr. R.N. Das (Sr. Advocate)** **Mr. T.M. Siddiqui**
Judgement On: -	**20th April, 2015**

I.P. MUKERJI, J.

The writ petitioner imported a large quantity of a substance alleged to be furnace oil. This is also known as fuel oil He did so between January and March, 2013 in six containers, from Singapore, Malaysia and Australia. The first and the second arrived on 1st January, 2013. The containers were unloaded and removed to a container freight station the very next day, 2nd January, 2013. Other containers followed.

The goods were detained by the customs for a long period of time on the suspicion that they were hazardous. Under our law hazardous goods cannot be imported into the country. Ultimately, the goods were found to be hazardous. However, permission was given by the Indian authorities to the petitioner to re-export the goods.

Now, unpaid rent or demurrage charges operate as a lien on the goods. The container freight station owners will not allow the goods to be removed unless their charges for storage are met. The charges are quite substantial. The writ petitioner says that these charges are more than the value of the goods. Although, diverse prayers have been made in the writ petition, the only prayer that was seriously urged by Mr. Jayanta Mitra, learned Advocate General appearing for the writ petitioner was that the demurrage charges be borne and paid by the customs, as the goods were detained for a prolonged period for their fault.

Now let me elucidate on the facts.

Out of the six containers two arrived in the port of Kolkata on 1st January 2013 and the others by March, 2013. Four containers were shipped from Singapore one from Malaysia and one from Australia. Of the six containers, five were shipped by M/s. Arrow Chem. Pvt. Ltd, Singapore and one by Houra Resources Pvt. Ltd., Australia.

The customs took up the first container on 29th January, 2013 for sampling and assessment of customs duty.

Similarly, the second container arrived at the port on 1st January, 2013. It was removed to the container freight station on the same day. On 1st February, 2013 sampling and assessment to duty were made. In the same way, the third container arrived on 6th January, 2013. It was removed to the container freight station on 8th January, 2013. Sampling and assessment to duty were made on 1st February, 2013. Again, the fourth container arrived on 2nd February, 2013and removed to the container freight station on 3rd February, 2013. Sampling and assessment to duty were made on 8th March, 2013. In the same manner, the fifth container arrived on 10th February, 2013 and was removed to the container freight station on 11th February, 2013. Sampling and assessment to duty were made on 9th March, 2013 and 25th March, 2013.

Lastly, the six container arrived on 15th March, 2013. It was removed to the container freight station on 16th March, 2013. Sampling and assessment to duty were made on 19th March, 2013.

The petitioner filed six bills of entry on 22nd January, 2013, 29th January, 2013, 29th January, 2013, 5th March, 2013, 5th March, 2013 and 13th March, 2013 for home clearance of the goods.

The alleged furnace oil was not released to the petitioner, although he wanted provisional release thereof. The respondents subjected the goods to tests on receipt of information that some unscrupulous importers were importing hazardous waste oil, importation of which was absolutely prohibited.

According to the affidavit-in-opposition affirmed on behalf of the customs on 29th October, 2014 the samples which were drawn from the goods were sent to the Customs House laboratory for testing. The test report dated 31st January, 2013 with reference to a part of the goods stated that the sample did not satisfy the requirement of furnace oil/fuel oil as per IS1593-1982. The Customs House laboratory recommended that the sample be sent to the Central Pollution Control Board, Kolkata, for testing.

Tests were carried out with regard to the rest of the goods and the report was the same. The main reason for coming to this opinion by the customs laboratory was that in the sample the mineral hydrocarbon oil was less than 70% by weight. Hence, it did not appear that the imported goods were furnace oil/mineral oil. Successive consignments of the goods were tested by the Customs till April, 2013, with the same report.

It would further appear from this affidavit, by their letter dated 3rd May, 2013 five sealed samples were sent by the Customs authorities in Kolkata together with their test report, to the Central Pollution Control Board to report to them

whether the goods were hazardous. The customs recorded in another letter of 7th May, 2013 that the Central Pollution Control Board, Kolkata had refused to accept the samples on the ground that no chemical tests were conducted in their office. This letter was addressed by the Customs to the scientist 'D' in-charge of the Central Pollution Control Board with a request whether his office would test the goods.

Then again on 9th May, 2013 the customs wrote to the Indian Oil Corporation that the Customs department had opined that the goods did not satisfy the requirements of furnace oil/ fuel oil and whether the two samples could be sent to the Indian Oil laboratory. On 23rd May, 2013 the customs reminded Indian Oil that they had not received their reply. On 24th May, 2013 the refineries division of Indian Oil Corporation, Kolkata e-mailed to them that the samples might be taken to Indian Oil's, Haldia refinery laboratory on 27th or 28th May, 2013 for testing. On 27th May, 2013 the Assistant Commissioner of Customs (Appraisal) Gr-1 informed the writ petitioner that the customs had opined that the goods were not furnace oil/fuel oil and that they were to be sent to the Central Pollution Control Board and Indian Oil Corporation (IOCL) for testing.

On 7th June, 2013 another lot of goods was sent by the customs to Haldia for testing.

The affidavit is not at all clear as to the report that was made by Indian Oil Corporation, Haldia regarding the goods. I find only a note of regret by them that they did not have the facility to perform the tests in the way the customs wanted them to do. Correspondence between the Customs and IOCL continued till at least mid-July, 2013.

Contrary to what the writ petitioner has stated in the petition that the customs did not permit them to store the goods in a bonded warehouse, under Section 49 of the Customs Act, 1962, the letter dated 27th May, 2013 by the customs to them, clearly suggests that the customs were offering them the option to store the goods under Section 49 in a bonded warehouse.

It is also averred in the affidavit that the petitioner was given the option of getting the goods tested at the National Test House but since he did not deposit the fees the samples were forwarded to the Central Revenue Control Laboratory, New Delhi.

The letter of the customs dated 6th November, 2013 records that the duplicate samples were being sent to the Central Revenue Control Laboratory, New Delhi for their opinion as to whether the goods were hazardous or not. On 11th December, 2013 this agency reported that the sample did not meet the requirement for furnace oil/fuel oil and fell under the category of “hazardous waste oil”.

Permission was granted to the writ petitioner by this Court on 18th December, 2013 in a writ application filed by him (WP 836 of 2013) to re-export the goods. The court did not make any observation as to the liability to pay the rent or demurrage charges of the container freight station owners.

In obedience to the said order dated 18th December, 2013 passed by Mr. Justice Tandon the Commissioner of Customs (Port) made an adjudication on 17th February, 2014 allowing re-export of the goods by the payment of fine of Rs. 10 lakh in terms of customs circular 100/03 dated 28th November, 2003 read with rule 17 of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008.

Meanwhile, the writ petitioner preferred an appeal from the said Judgment and order of Justice Tandon inter alia contending that he had a right to claim damages for wrongful detention of his goods by the customs, which had not been decided or kept open by the learned Judge. The appeal was disposed of on 9th July, 2014 inter alia by granting liberty to the writ petitioner to claim the consequences of the alleged delay by the customs.

The claim of the writ petitioner is confined to a very small area, in this writ application. The alleged fuel or furnace oil which had been imported by him had been lying from almost the time of their unloading in Kolkata Port in the

container freight stations operated by the eighth and ninth respondents. These freight stations allow a lay time or free time for removal of the goods. Beyond this period rent or demurrage is discharged. The quantity of alleged furnace oil/fuel oil imported by the writ petitioner is still lying in the container freight stations. Considerable rent or demurrage charges are due and payable on account of their storage. The eighth respondent claims

Rs. 24, 31,253 upto February 2015 whereas the ninth respondent claims Rs. 8,32,940 upto 6th April, 2015. The writ petitioner wants the customs to bear these charges because according to them the goods had to be stored in this godown for such a long period because of their fault. They also want this court to quash the order of the Commissioner of Customs (Port) dated 17th February, 2014 so as to avoid payment of a penalty of Rs. 10 lacs.

In other words, according to the writ petitioner, the goods were not tested within reasonable time. Secondly, the test report is erroneous.

What actually, the writ petitioner seeks in this writ application is damages in tort from the customs for wrongful detention of their goods. To establish their claim the petitioner had to establish misfeasance in public office by the customs officials which resulted in this loss to him. Now, it has to be seen, to what extent the writ petitioner has been able to establish this fault.

Whatever, may have been the time consumed, on 11th December, 2013 the Central Revenue Control Laboratory of the Government of India had come to a clear cut finding that the sample which was sent to them for testing did not meet the requirement of furnace oil/fuel oil and that the goods could be classified as hazardous.

Every importer, every trader and every manufacturer owes this duty to the nation of not bringing from outside, to this country, goods which are hazardous. Or in other words, substances which are injurious to human life. This report is uncontradicted. Although, it is contended on behalf of the writ petitioner that the exporter's document certified that the goods were not hazardous, he has been unable to bring any report from any test house or agency in India to certify that the goods are non-hazardous.

It also appears from the records that this kind of hazardous goods are rarely brought into this country. The routine testing centres like the ones available with the customs or Indian Oil Corporation, Haldia do not even have the facilities to test such goods. The testing department of the customs expressed doubt whether the goods were non- hazardous, after having declared that they did not fit into the description of furnace oil or fuel oil. The Central Pollution Control Board refused to receive the sample on the ground that it did not have

the testing facility. Ultimately, the Central Revenue Control Laboratory tested the goods and arrived at the finding that they were hazardous.

Throughout the annexures of the affidavit-in-opposition I find that constant efforts had been made by the customs to get the goods properly tested but they were faced with the obstacle that there were no adequate testing centres for them. I have recounted the correspondence that the customs had with Indian Oil Corporation, Central Pollution Control Board etc.. in the earlier part of the judgement.

In fact, the above correspondence brings to light two or three very important facts.

First, the petitioner did not respond to the letter of the customs to store the goods under Section 49 of the customs Act, 1962. Secondly, he did not even deposit the charges of the National Test House which could have tested the goods in Kolkata. Having not received the fees for testing such goods in this laboratory, they had to be sent to New Delhi to be tested by the Central Revenue Control Laboratory. Thirdly, the petitioner did not offer the services of another testing centre to test the goods so as to rule out that the goods were hazardous.

When the writ petitioner found that the imported goods were not being cleared for home consumption by the Indian authorities, he should have immediately

taken steps to re-export the same under Rule 17(2) of the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008. He took no decision to this effect before the hearing of the first writ before Mr. Justice Tandon.

I tend to form an opinion that the petitioner had a substantial contribution to make towards the delay.

The delay that was made by the Indian authorities was due to lack of testing centres in our country to test this kind of an unusual import of hazardous materials.

Law must be take its own course for the petitioner.

In Padam Kumar Agarwala vs The Additional Collector of Customs, Calcutta &Ors reported in AIR 1972 SC 542 cited by the Ld. Advocate General the customs had detained a consignment of lentil on the ground that these goods were sought to be exported by a Nepalese exporter through the Calcutta port in breach of the Indo Nepal treaty. The customs thought that the lentil were of Indian origin and originally imported into Nepal from India. The India Nepal treaty prohibited export of those goods. The Supreme Court negated both the premises of the customs holding that neither was it established that the goods were of Indian Origin nor was there any bar in the India Nepal treaty to the export of goods imported into Nepal from India. It opined that the customs

were fully responsible for the sizeable demurrage charges incurred. Nevertheless it refused to pass an order upon the customs to pay the demurrage.

First of all there is no direction by the Supreme Court, to the customs to pay the demurrage charges, as the Ld. Advocate General argued. The Court left it to the "good offices" of customs to pay the demurrage.

Secondly, there was a concrete finding that the customs were at fault.

Recent decisions of the Supreme Court have told us that a writ court is entitled even to decide disputed questions of fact if those facts can be easily decided on affidavits.

Here the findings can only be prima facie. In this mesh of facts the court cannot and should not come to any final finding regarding fault or the nature of the goods. So, on appraisal of the facts, prima facie the writ petitioner is not entitled to any remedy. For those reasons the other decisions cited by the Ld. Advocate General namely Akbar **Badruddin Jiwani vs. Collector of Customs** reported in **1990 (47) E.L.T.161 (SC)** , **Donald & Macarthy (P) Ltd. VS Union of India** reported in **1997(89) E.L.T.53(Cal)** and **Kumar Trading Co. LLC Vs. Union of India** reported in **2001(132)E.L.T.578(Cal),** where clear fault on the part of the customs or

innocence on the part of the petitioner was established, have no application in this case .

But the right of the petitioner to establish the fault of the Customs in a properly constituted civil proceeding is kept open.

This writ application is accordingly disposed of.

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I.P. MUKERJI, J.)