REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 9831-32 OF 2017
[Arising out of SLP (C) Nos. 771-772 of 2017]

Mumbai Port Trust ... Appellant

Versus

M/s. Shri Lakshmi Steels and Ors. etc. ... Respondents

With

CIVIL APPEAL NOS. 9833-34 OF 2017
(Arising out of SLP (C) Nos. 3418-3419 of 2017]

J U D G M E N T

Deepak Gupta, J.

Leave granted.

2. These civil appeals filed by the Union of India and the Mumbai Port Trust are directed against the judgment dated 23.12.2016 passed by the High Court of Punjab & Haryana at Chandigarh in CWP No. 10021 of 2016 and CWP No. 10036 of 2016, whereby the High Court allowed the writ petitions and held that the detention of the goods imported by the writ petitioners/importers (respondent-importers herein) by the

Customs, at the instance of the Directorate of Revenue Intelligence (for short 'DRI'), was totally illegal. The High Court directed that the goods imported by the respondent-importers be released to them on payment of custom duty. It further directed that the Port Trust was not entitled to charge any demurrage in view of Regulation 6(1) of the Handling of Cargo in Customs Areas Regulations, 2009 (in short '2009 Regulations') since the Customs had issued detention certificate. The detention charges demanded by the Shipping Line were ordered to be borne by the DRI and/or the Customs. The writ petitioners/importers were also held entitled to costs of Rs.50,000/- each to be paid by the Department.

3. The facts of the case are that the respondent-importers are two sister concerns viz., – (1) Inder International, a partnership firm, and (2) M/s Shri Lakshmi Steels, a proprietorship firm. These firms deal in the import and trading of cold rolled coils and sheets (primary and secondary). Both the importers had imported various consignments of cold rolled coils. We are concerned only with ten consignments imported on three dates. The first batch of consignments of coils was imported vide bills of entry dated 04.12.2015 and the goods imported were declared to

be cold rolled sheets/coils. The bills of entry for the second and third consignments were presented on 11.12.2015 and 29.12.2015 respectively.

4. On 14.12.2015, DRI wrote a letter to the Commissioner of Customs (Import), Mumbai to place the consignments of the respondent-importers, as well as some other importers, on hold. The DRI was of the view that these consignments required 100% examination before these could be released. On 28.12.2015, another letter was written by the DRI to the Customs in which it was mentioned that specific intelligence had been received that the firms had been importing consignments in violation of notifications issued by the Customs to evade provisional duty imposed on their imports. By this letter, the Customs Authorities were requested to get the goods examined 100% with the assistance of the Chartered Engineer with regard to the nature of the imported goods, including the description thereof, quality, thickness and width, along with supporting safeguards. In the meanwhile, on 18.12.2015, the respondent-importers in respect of the bills of entry dated 04.12.2015 and 11.12.2015 prayed that the duty be assessed under Section 18 of the Customs Act, 1962 (for short '1962 Act') and the goods be released, so as to avoid

payment of demurrage and detention charges. Thereafter, a reminder in this regard was sent by the respondent-importers on 22.12.2015. After the third consignment was received on 29.12.2015, another letter was written by the respondent-importers on 31.12.2015 followed by one more letter dated 01.01.2016, praying that the duty be assessed and the goods be released on payment of duty.

5. Since no action was taken by the Customs Authorities on the letters written by the respondent-importers, they filed writ petitions in the High Court of Punjab & Haryana praying that the goods be released. Thereafter, samples of the goods were drawn between 05.01.2016 and 11.01.2016 and sent to one Shri Rajendra S. Tambi, Chartered Engineer, for inspection. Shri Tambi got these samples tested from a Government approved laboratory M/s Perfect Laboratory Services and, as per the certificates issued by Shri Tambi on 19.01.2016, it was certified that the goods imported appeared to be cold rolled coils. This supported the case of the importers.

6. On 19.01.2016, DRI wrote to the Customs Authorities to assess the provisional custom duty. Thereafter, on 28.01.2016, the Commissioner of Customs sent a letter to the

respondent-importers asking them to produce PD Bond for release of goods and also to furnish bank guarantee of 20% of the provisional duty on the imported goods. Similar letters were written to other importers also, but no bank guarantee was demanded from them and only PD Bonds were sought. All the other importers took advantage of this offer and after furnishing PD Bonds they got the goods released after payment of customs duty.

7. The case of the respondent-importers herein is that they were informed about the letter dated 28.01.2016 only in Court on 03.02.2016 when a copy of the letter was handed over to them. According to the counsel for the respondent-importers, by this time, lakhs of rupees were due as demurrage and detention charges and, hence, they could not take advantage of the offer given by this letter. Moreover, the respondent-importers were asked to furnish bank guarantee whereas the other importers were not asked to do so.

8. It would also be pertinent to mention that DRI was not satisfied with the report of the Chartered Engineer. DRI was also not satisfied with the report of M/s Perfect Laboratory Services; according to DRI the samples sent to this laboratory were not

taken in the presence of the officials of DRI and the reports sent by this laboratory were false. Hence, the Customs Authorities decided to get the consignments checked again from another laboratory. Thereafter, samples of the goods were taken again and sent to another laboratory M/s TCR Engineering Services (for short 'TCR') on 20.01.2016. On 28.01.2016, this laboratory submitted its report. It opined that out of the ten consignments, the goods of eight consignments appeared to be hot rolled and goods of two consignments appeared to be cold rolled. However, bill of entry numbers were not mentioned and a fresh report was called from TCR and they were asked to give numbers of the bills of entry. Even the two consignments which were found to be cold rolled were not released. The grievance of the respondent-importers is that there was no provision for carrying out a second test and, in any event, the laboratory in question did not have any facilities to carry out test to distinguish between hot rolled and cold rolled coils.

9. On 01.02.2016, the respondent-importers wrote to the Commissioner of Customs for issuance of detention certificates so that they could secure waiver of demurrage and detention charges. According to the respondent-importers, though vide

letter dated 28.01.2016, provisional release of the goods had been permitted on furnishing of PD bond and bank guarantee, there was no reason for discriminating between respondent-importers and other importers, who were also under investigation and were not asked to furnish any bank guarantee. Further, according to the respondent-importers, on 04.02.2016, the Commissioner of Customs sent a communication to the Deputy Commissioner to the effect that he had received telephonic call from DRI directing that the samples should be drawn again from all the consignments and, for this purpose, the name of the laboratory would be informed later on. He was also told that the goods be released only after the process of sampling was complete. On 23.02.2016, the goods were seized and the respondent-importers were directed to approach the concerned authority for provisional release of the goods.

10. In the meantime on 05.02.2016, DRI wrote to the respondent-importers rejecting the request for issuance of detention certificate. The DRI also directed that the thickness of the coils be also measured to ensure that the respondent-importers were not evading import duty. However, on 05.03.2016, DRI sent another letter that provisional release be

allowed without waiting for measurement of goods. The fact however is that for one reason or the other the goods were not released. Both the parties blamed each other for the delay in release of the goods.

11. On 04.04.2016, the High Court of Punjab and Haryana passed orders in the writ petition filed by the respondent-importers directing the Customs Authorities to de-stuff the consignments within one week and the respondent-importers undertook to cooperate with the Customs Authorities during this process. According to the respondent-importers, the officials of the DRI with a view to harass them did not permit release of the goods, whereas, according to the Union of India and DRI, the representatives of the respondent-importers did not cooperate and violated the undertaking. Thereafter, on 22.04.2016, the Shipping Line issued notice to the respondent-importers that it proposed to auction the goods to recover the detention charges. On 09.05.2016, the respondent-importers withdrew the writ petitions filed by them with liberty to file fresh writ petitions.

12. Thereafter, fresh writ petitions were filed. An order was passed by the High Court on 03.06.2016 directing that samples of

the imported goods be sent to the Steel Authority of India Ltd. (for short 'SAIL'), Bokaro for testing. After testing, it was opined that the goods appeared to be cold rolled coils but there was also a finding that the thickness of the coil was at variance with the declaration given by the respondent-importers in respect of some of the consignments. Thereafter, the High Court, on 12.07.2016, directed that the goods be released on payment of due duty and the issue of detention and demurrage charges would be decided later. The order of the High Court dated 12.07.2016 was challenged before this Court by way of SLP (C) Nos. 23479-80 of 2016, which was allowed on 15.09.2016 setting aside the order dated 12.07.2016 passed by the High Court and the High Court was requested to dispose of the writ petition at an early date and release/auction of the imported goods was stayed pending disposal of the writ petition.

13. Respondent-importers had also levelled allegations of *mala fide* against the Officials of DRI. It was alleged that these officials were inimical towards respondent-importers since they were summoned to Court and the Court had made certain oral observations against such officials. As far as the allegations of *mala fide* are concerned, the High Court has not given any

clear-cut finding. The High Court however came to the conclusion that the respondent-importers were harassed by the officials of DRI and ordered that the respondent-importers were not liable to pay any demurrage and, even with regard to detention charges to be paid to the Shipping Line, held that it is DRI or the Customs Authorities who are liable to pay the same. The Port Trust was directed to waive the demurrage charges.

14. Two issues arise before us – (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 the DRI/Customs Authorities.

15. As far as the first issue is concerned, it would be pertinent to point out that the Mumbai Port Trust is a statutory authority created under the Major Port Trusts Act, 1963 (for short 'the Act'). A Major Port Trust is managed by the Board of Trustees appointed under Section 3 of the Act. The works and services to be provided by the Trust at the Major Ports are set out in Chapter V of the Act. Chapter V-A which was introduced with effect from 09.01.1997 provides for fixation of tariff for Major Port Trusts. The tariff to be charged by the port trust is determined by an

independent statutory authority, called the Tariff Authority for Major Ports, under Section 47A of the Act.

16. Shri K.K. Venugopal, learned senior counsel appearing on behalf of the Mumbai Port Trust, submitted that the High Court gravely erred in relying upon Regulation 6(l) of the 2009 Regulations, framed by the Central Board of Excise and Customs. He submitted that this subordinate legislation i.e., regulations framed by the Central Board of Excise and Customs cannot supersede the statutory provisions of the Major Port Trusts Act and the judgments of this Court. The stand of the Mumbai Port Trust is that it is entitled to recover the statutory tariff, including demurrage charges, from the respondent-importers and neither the High Court nor the Union of India, can direct it to release the goods without payment of such statutory charges. The second contention is that the High Court gravely erred in holding that the Port Trust is the custodian of the Customs Department under Section 45(1) of the Customs Act, 1962. In the alternative, he submitted, that even if the Port Trust is held to be a custodian, it is still entitled to charge demurrage on goods detained by the customs. Even if the Customs Authorities or DRI are at fault, the Port Trust cannot be barred from claiming the charges which are

charged statutorily. It is submitted that Regulation 6(l) is subject to other laws including the Major Port Trust Act and it was also submitted that Section 160(9) of the Customs Act, 1962 provides that nothing in the Customs Act shall affect any law for the time being in force relating to the constitution and powers of any Port authority in a major port as defined in the Indian Ports Act, 1908.

17. Shri Maninder Singh, learned Additional Solicitor General appearing for the Union of India submits that the High Court erred in directing the customs authorities and the DRI to pay the demurrage and the detention charges. He submits that the officials did not act mala fide. They had specific intelligence inputs that the respondent-importers were misdeclaring the goods to avoid payment of duty. He submits that even if it is found that the intelligence inputs were not correct, action cannot be said to be mala fide. He also submits that the respondent-importers did not exercise their option to pay provisional duty or get the goods de-stuffed. Therefore, no relief could have been given to the respondent-importers.

18. On the other hand the stand of the respondents is that once a detention order is passed by the Customs Authorities, the Port Trust has to waive the demurrage and reliance has been placed

on Section 128 of the Act and 2009 Regulations. The stand of the respondent-importers is also that in terms of the regulations the Mumbai Port Trust is not entitled to claim any demurrage charges for the period when the goods were under detention of the Customs Authorities. In the alternative, it is submitted that even if, for any reasons, the Mumbai Port Trust is held entitled to recover the demurrage charges, the liability of the same should be fastened upon the Customs Authorities/DRI.

19. Before dealing with these issues, it would be relevant to refer to the provisions of the Act. As already mentioned above, the Tariff Authority for Major Ports is constituted under Section 47A of the Act and the imposition and recovery of rates at Major Ports are fixed by the Tariff Authority. Section 48(1) of the Act provides that the authority shall, by notification in the Official Gazette, frame a scale of rates and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board in relation to a port. Sub-section (1)(d) of Section 48 deals with wharfage, storage and demurrage of goods. Section 53 of the Act empowers the Board to exempt, either wholly or partially, any goods or vessels or class of goods of vessels from the payment of any rate or of any charge leviable in special case, for the

reasons to be recorded in writing. Section 58 deals with time for payment of rates on goods. Section 59 of the Act provides that the Board shall have a lien on the goods which are kept in the port in respect of the amount due to the Board under the provisions of the Act.

Sections 48, 53, 58 and 59 of the Act read as follows:

> *"**48. Scales of rates for services performed by Board or other person.**- (1) The Authority shall from time to time, by notification in the Official Gazette, frame a scale of rates at which, and a statement of conditions under which, any of the services specified hereunder shall be performed by a Board or any other person authorised under section 42 at or in relation to the port or port approaches-*
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> *(a) transhipping of passengers or goods between vessels in the port or port approaches;*
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> *(b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches;*
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> *(c) carnage or porterage of goods on any such place;*
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> *(d) wharfage, storage or demurrage of goods on any such place;*
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> *(e) any other service in respect of vessels, passengers or goods,*
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> *(2) Different scales and conditions may be framed for different classes of goods and vessels.*
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> ***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.

58. Time for payment of rates on goods.*- Rates in respect of goods to be landed shall be payable immediately on the landing of the goods and rates in respect of goods to be removed from the premises of a Board, or to be shipped for export, or to be transhipped, shall be payable before the goods are so removed or shipped or transhipped.*

59. Board's lien for rates*.- (1) For the amount of all rates leviable under this Act in respect of any goods, and for the rent due to the Board for any buildings, plinths stacking areas, or other premises on or in which any goods may have been placed, the Board shall have a lien on such goods, and may seize and detain the same until such rates and rents are fully paid.*

(2) Such lien shall have priority over all other liens and claims, except for general average and for ship-owner's lien upon the said goods for freight and other charges where such lien exists and has been preserved in the manner provided in sub-section (1) of section 60, and for money payable to the Central Government under any law for the time being in force relating to customs, other than by way of penalty or fine."

The Union of India relies upon the provisions of Section 128 of the Act, which read as follows:

"128. Saving of right of Central Government and municipalities to use wharves, etc., for collecting duties and of power of Customs Officers.*- Nothing in this Act shall affect-*

(1) the right of the Central Government to collect customs duties or of any municipality to collect town duties at any dock, berth, wharf, quay, stage, jetty or pier in the possession of a Board, or

(2) any power or authority vested in the customs authorities under any law for the time being in force."

As far as the Customs Act is concerned, we may refer to Section 45 and Section 160(9) of the Act, which read as follows:

> *"45. Restrictions on custody and removal of imported goods. - (1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.*
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> *(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force, -*
> *(a) shall keep a record of such goods and send a copy thereof to the proper officer;*
>
> *(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.*
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> *(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried."*
>
> ***"160. Repeal and savings.-***
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> *xxx xxx xxx*

> *(9) Nothing in this Act shall affect any law for the time being in force relating to the constitution and powers of any Port authority in a major port as defined in the Indian Ports Act, 1908 (15 of 1908).”*

Regulations 2(b) and 6(l) of the 2009 Regulations are also relevant and the same read as follows*:*

> ***“2. Definitions.-*** *xxx xxx xxx*
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> *(b) "Customs Cargo Services provider" means any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods and includes a custodian as referred to in section 45 of the Act and persons as referred to in sub-section (2) of section 141 of the said Act.”*
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> ***“6. Responsibilities of the Customs Cargo Service provider.-***
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> (1) *The Customs Cargo Service provider shall -*
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> *xxx xxx xxx*
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> *(l) subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or Inspector of Customs or Preventive officer or examining officer, as the case may be.”*

20. The issue whether an importer is liable to pay demurrage charges even when the imported goods have been detained by the Customs Authorities and later it is found that the version of the importer is correct, has been the subject matter of a number of decisions. In the case of ***Trustees of the Port of Madras*** *v.* ***M/s Aminchand Pyarelal***[1], the Customs Authorities had issued

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1 (1976) 3 SCC 167

detention certificate of imported goods. There was no fault or negligence on the part of the importer. The Trustees of the Port of Madras waived demurrage charges for the period of detention; the importer paid the balance amount and cleared the goods. Later, the Board wrote to the Customs Authorities that the detention certificate had been wrongly issued. Thereafter, the Board sued the importer for recovery of the balance demurrage charges. It was urged that the Board could not charge demurrage for the period during which the goods had been detained for no fault or negligence of the importer or his agent. This Court, after noticing the provisions of the Madras Port Trust Act, especially Sections 42, 43 and 43A thereof, which are similar to the provisions of the Major Port Trusts Act, 1963 referred to above, held that the Board was entitled to claim the rates as framed under the provisions of the said Act. This Court held that the Port Trusts were public representative bodies entrusted by the Legislature with authority to frame the scale of rates and the conditions subject to which these rates and services were to be rendered. These rates were approved by the Central Government and, thereafter, the rates had the force of the law. It was held that the Port Trusts were under a statutory obligation to render

services of various kinds in the larger public and national interest. In case there is congestion in the port it would affect the free movement of ships and of essential goods. Therefore, the scale of rates had to be framed in such a manner that it worked both as an incentive to the importers to remove the goods as expeditiously as possible from the transit areas and also acted as a disincentive to keep the goods in the premises of the Board for a long time, thereby increasing the demurrage charges substantially with passage of time. This Court held that the High Court was in error in holding that the Board's power to charge demurrage was limited to cases where the goods were not removed from its premises due to some fault or negligence on the part of the importer.

21. In ***Board of Trustees of the Port of Bombay*** *v.* ***Indian Goods Supplying Co***[2], this Court held that it was the duty of the Board to recover rates; the Board had a lien on the goods and the right to seize and detain the goods, until the rates were fully paid and to sell the goods if the rates were not paid and recover the same. It was held that certain concessions may be given taking into account the hardship of the importers, but the legality of the rates cannot be questioned. This Court went on to hold that the

2 (1977) 2 SCC 649

importer of the goods was liable to pay the demurrage charges even if the importer was not responsible for any delay, nor any fault could be attributed to the importer.

22. In ***Board of Trustees of the Port of Bombay*** *v.* ***Jai Hind Oil Mills Company***[3], this Court noted that the provisions of the Major Port Trust, 1963 were *pari materia* to the acts governing the Individual Port Trusts prior thereto. It was held that the demurrage charges are levied in order to ensure quick clearance of the cargo from the harbour and the rates are fixed in such a way that they would make it unprofitable for the importer to use the port premises as a warehouse.

23. In all these cases, this Court took the view that the Board of Trustees of the Ports, which are creations of a statute, are entitled to charge demurrage and other charges from the importer even in respect of those periods during which the importer was unable to clear goods from the premises of the Board, for no fault or negligence on the part of the importer. It was further held that the Boards were entitled to charge demurrage from the importer even when the importer was unable the clear the goods because of the detention thereof by the

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3 (1987) 1 SCC 648

Customs authorities, which detention may later on have been found to be unjustified.

24. The provisions of the International Airport Authority Act, 1971 are similar in nature and these provisions came up for consideration before this Court in ***International Airports Authority*** *v.* ***Grand Slam International***[4]. In that case, this Court took note of Section 45 of the Customs Act and held as follows:

> *"41. None of these provisions entitles the Collector of Customs to debar the collection of demurrage for the storage of imported goods. They do not entitle him to impose conditions upon the proprietors of ports or airports before they can be approved as Customs ports or Customs airports. Section 45 provides that all imported goods imported in a customs area must remain in the custody of the person who has been approved by the Collector of Customs until they are cleared and such person is obliged not to permit them to be removed from the customs area or otherwise dealt with except under and in accordance with the permission of the Customs Officer. Section 45 does not state that such person shall not be entitled to recover charges from the importer for such period as the Customs Authorities direct.*
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> *42. The purpose of the Customs Act on the one hand and the Major Port Trusts Act and the International Airports Authority Act on the other hand are different. The former deals with the collection of Customs duties on imported goods. The latter deals with the maintenance of seaports and airports, the facilities to be provided thereat and the charges to be recovered therefor. An importer must land the imported goods at a seaport or airport. He can clear them only after completion of customs formalities. For this purpose, the seaports and airports are approved and provide*

4 (1995) 3 SCC 151

> *storage facilities and Customs officers are accommodated therein to facilitate clearance. For the occupation by the imported goods of space in the seaport or airport, the Board or the Authority which is its proprietor is entitled to charge the importer. That until customs clearance the Board or the Authority may not permit the importer to remove his goods from its premises does not imply that it may not charge the importer for the space his goods have occupied until their clearance.*
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> *xxx xxx xxx*
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> *44. It cannot be gainsaid that, by reason of unjustified detention of his goods by the Customs Authorities, the importer is put to loss by having to pay demurrage charges for the periods of such detention. The Central Government is empowered by Section 35 of the International Airports Authority Act, 1971, and Section 111 of the Major Port Trusts Act, 1963 to issue to the Authority and the Board of Trustees, respectively, directions on questions of policy after giving them an opportunity, as far as practicable, of expressing their views. The Central Government can, if so advised, after giving to the Authority and the Board of Trustees the opportunity of expressing their views, direct them, under the aforementioned provisions, not to levy demurrage charges for periods covered by detention certificates."*

Justice Venkatachala, in his concurring judgment, after referring to the various judgments of this Court cited hereinabove, held as follows:

> *"66. From the above decisions of this Court it becomes clear that an authority created under a statute even if is the custodian of the imported goods because of the provisions of the Customs Act, 1961, would be entitled to charge demurrages for the imported goods in its custody and make the importer or consignee liable for the same even for periods during which he/it was unable to clear the goods from the customs area, due to fault on the part of the Customs Authorities or of other authorities who might have issued detention certificates owning such fault.*

xxx xxx xxx

> *69. Therefore, my answer to the question considered by me is in the negative i.e. the Collector of Customs empowered under sub-section (1) of Section 45 of the Customs Act, 1962 to approve persons to be custodians of imported goods in customs areas until they are cleared as provided for therein, while approving the International Airports Authority of India to be the custodian of such imported goods in the customs area of Indira Gandhi International Airport, New Delhi and Central Warehousing Corporation to be the custodians of such imported goods received at the customs area - the Container Freight Station, CWC Complex, Pragati Maidan, New Delhi, by issue of public notice or otherwise in that regard, if by such notice or otherwise directs such custodians not to collect custody charges from the consignees of such goods - "the Cargo", because of detention certificates issued by him or his delegates, will not be acting within the powers conferred upon him under the Act, its Rules or its Regulations and hence directions given by the Customs Collector or his delegatees to release the goods of importers or consignees without collecting demurrage charges from them cannot be enforced by courts either against IAAI or CWC."*

This Court clearly held that Section 45 of the Customs Act did not, in any manner, affect the rights to the International Airport Authority to collect charges from the importer.

25. In ***Union of India*** *v.* ***R.C. Fabrics (P) Ltd.***[5], this Court followed the law laid down in ***Grand Slam*** (supra). Thereafter, in ***Om Shankar Biyani*** *v.* ***Board of Trustees, Port of***

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5 (2002) 1 SCC 71

Calcutta[6], this Court, after referring to Section 58 of the Major Port Trust Act, held as follows:

> *"8. .....Thus the charges of the 1st Respondent are to be paid before the goods are removed. The High Court seriously erred in permitting removal of the goods without payment of the port charges. To be noted that it was never disputed that the charges were payable. The 1st Respondent was not concerned with the dispute as to who had to pay the charges. It was the appellant who was interested in clearance of the goods. It was for him to have paid the charges and cleared the goods. Even if it was the appellant's case that the Customs Authorities had to pay the charges, the appellant should have first cleared the goods by paying charges due to the 1st respondent and then claimed reimbursement from the Customs Authorities."*

26. The High Court in the impugned judgment has made reference to the aforesaid judgments, but has distinguished them only on the ground that these judgments were rendered prior to the promulgation of the 2009 Regulations and, therefore, held these to be inapplicable. We shall deal with this issue later on, but we may first refer to the judgment of this Court in ***Shipping Corporation of India*** *v.* ***C.L. Jain Woolen Mills***[7] relied upon by the High Court. It would be pertinent to mention that this judgment does not deal with the Major Port Trust Act, nor does it deal with the International Airports Authority of India Act. In that case, the issue before this Court was with regard to

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6 2002) 3 SCC 168
7 (2001) 5 SCC 345

demurrage charges levied by the Shipping Corporation of India. This Court in fact affirmed the law laid down in ***Grand Slam*** (supra). It would be apposite to make reference to the following portion of the judgment:

> *"7. ..... Having scrutinized the provisions of the Customs Act, we are unable to find out any provision which can be remotely construed to have conferred power on the Customs Authorities to prevent the proprietor of the space from levying the demurrage charges and, thereby absolving the importer of the goods from payment of the same. ....."*

In that case, this Court gave certain directions in the peculiar facts of the case, but the law laid down in ***Grand Slam*** (supra) has not been whittled down.

27. The High Court also placed reliance on certain observations made by this Court in the case of ***Union of India*** *v.* ***Sanjeev Woolen Mills***[8], wherein the directions were given by the Delhi High Court that the demurrage and container detention charges should be borne fully by the Customs Department. It would be pertinent to mention that the matter before this Court arose out of the Contempt Proceedings and no challenge had been made to the earlier judgment of the Delhi High Court directing the Customs Authorities to pay the demurrage and container detention charges. That order had become final and it was under

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8 1998 (100) ELT 323

these circumstances that this Court refused to interfere with the orders passed in contempt proceedings. This case has no bearing on the facts of the present case.

28. The High Court has mainly relied upon Section 45 of the Indian Customs Act read with Regulation 2(l) of the 2009 Regulations while issuing directions to the Mumbai Port Trust not to collect demurrage from the importers. The first contention on behalf of the Trust is that the Port Trust is not a custodian of the Customs Department under Section 45(1) of the Customs Act. We are not going into this issue in view of the fact that the notification dated 11.10.2000 issued by the Commissioner of Customs under Section 45(1) of the Customs Act, 1962 approving the Mumbai Port Trust as Custodian under Section 48 of the Customs Act was challenged by the Mumbai Port Trust before the Bombay High Court and the High Court by its judgment dated 22.07.2009 has quashed the said notification. The judgment of the Bombay High Court is under challenge before this Court. For the purpose of this case, we are proceeding on the assumption that the Mumbai Port Trust is a custodian within the meaning of Section 45 of the Customs Act. Regulation 2(b) of the 2009 Regulation lays down that the Custom Cargo Service

Provider is a person responsible for receipts, storage, delivery, despatch, handling etc. of the imported goods and includes the custodian referred to in Section 45 of the Customs Act.

29. Assuming for the purpose of the decision of this case that Mumbai Port Trust is a custodian or cargo service provider, the question that arises is whether these Regulations apply to the Mumbai Port Trust. These Regulations have been framed under Section 157 of the Customs Act. Section 160(9) of the Customs Act clearly lays down that nothing in the Act shall affect the power of the Port Authority in a Major Port, as defined in the Indian Major Port Trusts Act, 1963. It is not disputed before us that the Mumbai Port Trust is a major port.

30. As already explained hereinabove, the Mumbai Port Trust has the power and authority to levy rates including demurrage as fixed by the Tariff Authority under Section 47A of the Act. This right of the Port Trust is not affected either by the provisions of the Customs Act or by the Regulations of 2009. Section 160(9) of the Customs Act clearly lays down that the provisions of the Customs Act shall not in any manner affect the constitution and powers of any port authority in a major port. This will include

the right of the major port authority that is a Major Port Trust to levy and charge rates and demurrage.

31. As far as 2009 Regulations are concerned, these are the Regulations framed under the Customs Act. Regulations are in the nature of subordinate legislation. There can be no manner of doubt that subordinate legislation that too a legislation framed by a Board under the Customs Act cannot in any manner affect the power and authority of the Major Port Trust, statutorily vested in it.

32. Neither the regulations nor the provisions of the Customs Act can impinge or in any manner affect the statutory power of the Major Port Trusts to levy rates under the Act. In fact, the Authority that framed the Regulations was itself aware of this because Regulation 6(l) itself begins with the words " subject to any other law for the time being in force". It is, therefore, obvious that the Regulations are subject to any other law including the Major Port Trust Act. Therefore, these Regulations cannot in any manner affect the right of the Port Trust. We are, therefore, of the view that the High Court erred in holding that the law settled by this Court in a catena of judgments referred to above was no longer applicable in view of the 2009 Regulations. Reliance

placed by the Union of India on Section 128 of the Major Port Trusts Act is totally misplaced. This provision only deals with the right of the Central Government to collect customs duties. It does not deal with the rights of the Port Trust to collect rates including demurrage.

33. The next issue which arises is whether any direction could be issued to the DRI/Customs Authorities to pay the demurrage charges to the Port Trust and the detention charges to the Shipping Line.

34. We have already referred to a number of decisions wherein the law has been clearly laid down that even if the importer is not at fault, it is the importer alone who is liable to pay the demurrage charges. As far as detention charges are concerned, this is a private contract between the importer and the carrier, i.e. Shipping Line. The DRI/Customs authorities can be directed to pay the demurrage/detention charges only when it has proved that the action of the DRI/Customs Authorities is absolutely *mala fide* or is such a gross abuse of power that the officials of the DRI/Customs should be asked to compensate the importer for the extra burden which he has to bear. 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 from the customs authority.

35. In the present case allegations of *mala fides* were levelled against Respondent Nos. 7 & 8, Santokh Singh and Roopesh Kumar. The allegation is that since the respondent-importers had filed writ petitions before the High Court wherein the said officials had been summoned to appear in person these two officials had acted *mala fide* against the respondent-importers. Charges of discrimination have also been levelled against them. These persons were arrayed as Respondent Nos. 7 and 8 in the writ petition. Initially, a written statement was filed by Respondent Nos.1-3 and 5-8 which was not signed by these two persons. Thereafter, these two persons filed an application for permission to file written statement which was filed on 07.11.2016 probably after arguments have been heard. These written statements have not been taken into consideration by the High Court. Charges of *mala fide* are serious and these charges were denied in the first written statement and with the second written statement, an affidavit was filed by Respondent Nos. 7 & 8 denying the same charges. Therefore, the second affidavit should not have been brushed aside. In any event, it would be

important to note that the High Court itself did not go into this aspect in detail and observed as follows :-

> *"...This Court is not going into much detail on this aspect, but it can safely be opined that the action was not bona fide, if not strictly malafide....."*

Therefore, there is no specific finding of *mala fides.* However, the High Court held that the respondent-importers suffered a loss because of delay on the part of Revenue staff to clear the goods and the executive instructions of the Department were violated.

36. We are not in agreement with the judgment of the High Court. Both the respondent-importers imported consignments on 04.12.2015, 11.12.2015 and 29.12.2015. The case of the Revenue is that it had prior information that the respondent-importers along with other importers of Ludhiana were evading safeguard duty imposed on hot rolled steel products by mis-declaring their goods to be cold rolled products. They were also allegedly using the method of pickling and oiling to make the products appear like hot rolled products. The Revenue also had intelligence reports that in respect of previous transactions the importers had declared the goods to be cold rolled to the Customs Authorities but hot rolled before the Excise Authorities. On 14.12.2015 search was carried out in the

business premises of one of the importers namely M/s Inder International and cash amounting to Rs. 63,30,000/- was recovered. 50 MT of imported sheets were also detected. The DRI had some intelligence inputs that certain consignment of coils earlier cleared by the importers from Mumbai Sea Port and which had been declared as secondary, defective CR coils were declared to be hot rolled coils before the Excise and Taxation Department. Even with regard to the thickness of the sheets/coils large number of discrepancies were found in the earlier consignments imported by the same importers. These may be separate transactions but the Revenue was justified in apprehending that the imported goods may have been mis-declared and, therefore, they must be thoroughly checked and verified.

37. It would also be pertinent to mention that the DRI, Ludhiana issued summons to Shri Indresh Jain, who is a partner in M/s Inder International asking him to be present in the Office of the DRI on 15.12.2015. He did not appear and summons were again sent to him on 17.12.2015 to appear on 18.12.2015 when again he did not appear. Meanwhile, a letter was sent on 14.12.2015 by DRI to Mumbai Customs asking them to withhold the release of the imported consignments. A letter was also sent to the

Shipping Line on 17.12.2015 requesting them not to allow any change in the description of the import of goods.

38. On 21.12.2015, search was conducted in the premises of the respondent-importers and, according to the Revenue the respondent-importers allegedly admitted that they had earlier imported certain sheets of secondary and defective nature from ICD, Sonepat, Haryana, thereby violating the Import Licensing Note.

39. On 22.12.2015, the respondent-importers requested that their goods be released by assessing customs duty under Section 18 of the Customs Act. Since the respondent-importers apprehended that the DRI had asked the Shipping Line not to release the goods, a clarification was issued on 23.12.2015 by the DRI to the Shipping Line that it had not instructed the Shipping Line not to issue delivery orders but had only asked that no changes should be made in the Bill of Lading with regard to the description of goods.

40. It would be important to note that the duty was discharged by the importer in respect of Bills of Entry dated 04.12.2015 and 11.12.2015, only on 23.12.2015. Therefore, prior to that date there could not have been any release of goods. In fact, in respect

of one of the Bills of Entry dated 04.12.2015, the same was presented to the Customs Authorities and customs duty was paid after 30th December, 2015.

41. Shri Indresh Jain appeared before the DRI on 28.12.2015. On the one hand the respondent-importers were praying for the release of goods and on the other hand their representative was not appearing before the Authorities. Here it would be important to note that the third consignment was received only on 29.12.2015 and, thereafter, the goods were examined from 05.01.2016 to 11.01.2016. In the meantime, the importer filed writ petitions in the Punjab and Haryana High Court.

42. The Customs Authorities drew the samples of the goods from 05.01.2016 to 11.01.2016 . These were sent to Mr. Tambi, Chartered Engineer. Shri Tambi also procured the test report from M/s Perfect Laboratories and issued a certificate on 19.01.2016. According to him the goods were cold rolled coils as declared by the respondent-importers. Therefore, we are of the opinion till this stage there was no unnecessary delay on the part of the DRI.

43. After 19.01.2016, there are allegations and counter allegations made by both the parties against each other. It is

however clear that the DRI was not satisfied with the report given by Shri Tambi. Even if that be so, now since the Chartered Engineer appointed by the Revenue authorities had held the goods to be cold rolled goods, the DRI should have released the goods. It is the case of the DRI that on 25.01.2016 a decision was taken that these consignments and future imported consignments of the respondent-importers be released by resorting to provisional assessment under Section 18 of the Customs Act. A letter in this behalf was sent on 28.01.2016 and it was received by the Customs Authorities on the same date i.e. 28.01.2016. The case of the DRI is that the letter was also communicated to the respondent-importers but, according to the respondent-importers they came to know about the letter only on 03.02.2016.

44. The respondent-importers did not take the benefit of provisional assessment offered on two grounds :- (1) that all other importers were only asked to furnish PD Bonds whereas the importers herein were asked to furnish some bank guarantee also. (2) That the demurrage and detention charges had piled up. The stand of the DRI is that all other importers were importing sheets/scrap and not coil. It was only the

respondent-importers who were importing coils. Safeguard duty is applicable only in relation to coils and not in relation to sheets. Therefore the original respondent-importers were asked to furnish bank guarantees also. The respondent-importers were required to furnish bank guarantee only to the extent of 20% of the provisional assessment and the bank guarantee demanded was only Rs. 18.71 lakhs. It is thus obvious that importers even at this stage could have got the goods released only by furnishing the bank guarantee for Rs.18.71 lakhs and furnishing PD Bonds. All other importers took benefit of this offer given by the DRI/Customs and got their goods released but the respondent-importers for the reasons best known to them did not take the benefit of this offer. We may also add that if they had taken the benefit of this offer there could have been a reduction of the demurrage as was done in the case of other importers.

45. As far as the period after the first week of February is concerned, from the record it is apparent that the revenue sent samples of the goods imported to M/s. TCR. As per the reports of TCR eight of these consignments were hot rolled coils and not cold rolled coils. The allegation of the petitioner is that the report of Mr. Tambi was not accepted and the goods sent to M/s. TCR

for analysis even though M/s. TCR did not have the requisite facilities to carry out the tests. The revenue cannot be barred from asking for a second test. Whether M/s. TCR were competent to carry out the test or not is not for us to decide. However, in these tests, eight of the consignments were found to be violating the import guidelines. Even thereafter, offer were given to the assessee to de-stuff the goods and also to get the goods released for provisional assessment which offer was not accepted by the assessee.

46. We are, therefore, clearly of the view that even though there may be some delay on the part of the DRI and the customs authorities, the respondent-importers have also been guilty of delaying the matter and, therefore, they cannot claim that they are not liable to pay demurrage and detention charges. We may, however, clarify that the respondent-importers are free to approach the Mumbai Port Trust in terms of Section 53 of the Act for exemption and remission of demurrage and other charges and the Board may take a sympathetic view while considering the case of the respondent-importers under Section 53.

47. As far as detention charges of the Shipping Line are concerned, in addition to what we have observed above, we are of

the view that the High Court could not in writ proceedings have directed the DRI/Customs to pay the detention charges to the Shipping Line since these were to be paid on the basis of a contract between the respondent-importers and the shipping line.

In view of the above discussion, the appeals are allowed. The judgment of the High Court is set aside and the writ petitions filed by the respondent-importers are dismissed. No order as to costs. Pending application(s), if any, stand(s) disposed of.

.....J.
(MADAN B. LOKUR)

.....J.
(DEEPAK GUPTA)

New Delhi
July 27, 2017