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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P. (C) 3589/2017 & CM APPL. 15768/2017**

MUSCLES FUSION FZE ..... Petitioner
Through: Ms. Anjali J. Manish, Advocate.

versus

THE PRINCIPAL COMMISSIONER OF CUSTOMS (IMPORT), AIR CARGO COMPLEX, NEW DELHI & ORS. ..... Respondents
Through: Mr. Amit Bansal and Mr. Akhil Kulshreshta, Advocates for R-1 & 2.
Mr. Milanka Chaudhary, Mr. Sarojanand and Ms. Satakshi Sood, Advocates for R-3.
Mr. Rakesh Tiku, Senior Advocate and Mr. Sarul Jain, Advocate for R-4.

CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% **02.08.2017**

Prathiba M. Singh, J.

1. The short question in the present case is - Whether the Petitioner is permitted to re-export its consignment of health products without payment of demurrage/rent charges owed to the Cargo handling company?

2. The Petitioner - a Dubai based trading company, exported a consignment of health products against Airway Bill No.607-67933913 through Etihad Airways, Abu Dhabi to Delhi. According to the Petitioner, the consignment

consisted of 919 cartons packed in 11 pallets weighing 4325 kg. The invoice dated 23rd April 2016, accompanying the consignment was raised on M/s. Visha Enterprises, Delhi (hereafter 'Visha Enterprises'). Upon the arrival of the consignment in Delhi, the importer Visha Enterprises did not file any bill of entry and also did not send any remittance for such consignment.

3. On 2nd May, 2016, the Directorate of Revenue Intelligence ('DRI') requested the Deputy Commissioner (Import Shed) at the Indira Gandhi International ('IGI') Airport, New Delhi to put the consignment on hold and to examine the same in the presence of DRI officers.

4. The Petitioner sought permission from the Customs authorities to re-export the goods - which request was forwarded by the Commissioner of Customs (Import) on 25th May 2016. The DRI then sought a clarification if the process of import with respect to the said consignment was completed. This letter dated 24th June, 2016 was also sent to the importer Visha Enterprises.

5. On 22nd July, 2016, the Petitioner through its Authorised Representative (AR) requested both the DRI and the Customs authorities for grant of No Objection Certificate ('NOC') or permission to re-export the consignment. It is the case of the Petitioner that it continues to be the owner of the consignment, as the importer Visha Enterprises was not aware of the consignment as it had not placed an order for the said goods. The Petitioner took the stand that the consignment was sent to India by mistake. On 29th July/1st August, 2016 the DRI requested the Principal Commissioner of

Customs (Import) to consider the Petitioner's plea for re-export and also ascertain the question of the importability of the said goods. The Petitioner, on 2nd August, 2016, again sought a NOC from the DRI on the ground that re-export was not being permitted without a NOC from the DRI. The Petitioner further claimed that since the imported items were health products having limited shelf life and being perishable in nature, the request may be considered at the earliest. The DRI then informed the Petitioner that the case of the Petitioner had been referred to the Principal Commissioner of Customs (Import).

6. Since no permission for re-export was granted by the authorities, the Petitioner filed W.P.(C) No.7309/2016 before this Court. In the said petition, M/s. Visha Enterprises was also impleaded vide order dated 19th August, 2016. Thereafter, the said writ petition was disposed of by this Court on 14th September, 2016 in the following terms.

> *"W.P.(C) No. 7309/2016*
>
> *The matter is listed today as 13.09.2016 was declared holiday on account of 'Id-ul-Zuha'.*
>
> *The Petitioner's grievance is that the respondents – Customs authorities are not concluding their proceedings expeditiously. It is contended that the goods were never imported but were brought for re-export purposes and that in any event the importer had in fact abandoned the goods.*
>
> *The materials on record show that the respondents acted on the basis of the information by the DRI and have seized the goods.*
>
> *In the circumstances, the respondents shall take steps to conclude the investigation and take*

appropriate follow-up action as is necessary having regard to the outcome of the investigation at the earliest convenience and preferably within four months from today.

W.P. (C) 7309/2016 stands disposed of."

7. Pursuant to the above order, a hearing was granted to the Petitioner on 10th January, 2017. Vide order dated 13th January, 2017, the Additional Commissioner of Customs (Imports) *(hereinafter `ACC (Imports)')* held that the goods are liable to be confiscation under Section 111 (d) of the Customs Act, 1962 (hereafter referred to the 'CA'), as imports of health products were barred under Section 22 of the Food Safety and Standards Act, 2006 (hereafter 'FSSA'). However, rather surprisingly, he also accepted the explanation of the Petitioner that the consignment had been wrongly despatched to India and that this was a case of bona fide mistake. After having been passed orders of confiscation, the ACC (Imports) did not levy any fine or penalty.

8. On 18th January, 2017, the Petitioner, relying upon the said order of the ACC (Imports) sought waiver of ground rent and demurrage charges. This was followed with another request on 4th February, 2017 to CELEBI, the customs cargo handler at the IGI Airport, for waiver of the said charges. Upon not getting a positive response, the Petitioner filed a second writ petition being W.P. (C) No.2773/2017 in which this court passed the following order dated 27th March, 2017.

*"**W.P.(C) 2773/2017***

The Petitioner's grievance is that despite the order dated 14.09.2016 passed by this Court in W.P.(C)7309/2016, the respondents have not issued a detention certificate in accordance with law.

Mr. Amit Bansal, Advocate appearing on advance notice submits that detention certificate has since been issued on 25.03.2017 and that the same has been despatched to the Petitioner through his counsel. A copy of the said detention certificate has been shown to the Court. Since it is unreadable, the same is not taken on the record.

In view of the statement, the third and fourth respondents shall take necessary consequential action giving due effect to the re-export order having regard to the detention certificate expeditiously.

The writ petition is disposed of in the above terms.

Order dasti."

9. Almost simultaneously, the ACC (Imports) on 27th March, 2017 made a request to CELEBI to consider the waiver of detention / demurrage charges. Despite receiving the said letter, the Respondent CELEBI did not waive the demurrage charges, which resulted in the Petitioner filing the present writ petition seeking the following relief:

"(a) Issue a writ, order or directions in the nature of Mandamus to the Respondent No.3 & 4 to allow the re-export of the goods imported against Airway Bill No.607-67933913 dated 23.04.2016 without charging any demurrage/ground rent from the Petitioner;....."

Petitioner's Submissions

10. Ms. Anjali Manish, learned counsel appearing for the Petitioner, submits that the export of the consignment by her client to India, being a bona fide mistake, re-export deserves to be permitted without payment of demurrage charges. Ms. Manish relied on Section 6 (1) (l) of the Handling of Cargo in Customs Area Regulations, 2009, (*hereafter `2009 Regulations'*) which reads:

> *"6. Responsibilities of Customs Cargo Service provider:*
>
> *(1) The Customs Cargo Service provider shall-..*
>
> *(a)- (k).......*
>
> *(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;"*

11. Ms. Manish further submits that the reason for this particular Regulation was the Report of the Public Accounts Committee (2005-06), according to which, demurrage was not to be charged if there was a lapse in the discharge of responsibilities by the Customs officials. Ms. Manish submits that as per the judgment of this Court in ***Trip Communication Pvt. Ltd. v. Union Of India*,*2014 (320) E.L.T. 321 (Del.),*** the Petitioner would be entitled for waiver as the ACC (Imports), in his order dated 13th January, 2017, had, after evaluating the material available on record, held that the Petitioner's export of the consignment to India was a bona fide mistake.

12. Ms. Manish, relying on Circular No. 4/2015-CUS dated 20th January, 2015, submitted that CELEBI and DIAL usually grant such waivers as per the prevalent policy. She strenuously urges that since the competent authority has held that the export to India was a bona fide mistake, the Petitioner is entitled to the benefit of the said circular. Ms. Manish further relies upon the judgments in ***International Airports Authority of India v. Grand Slam International, (1195) 3 SCC 151*** and ***Garden Silk Mills Ltd. v. UOI (1999) 8 SCC 744*** to state that the Petitioner continues to be the owner of the goods and since the bill of entry had not been filed, there was no import in the eyes of law. She further relies upon ***Union Of India v. Sampat Raj Dugar, (1992) 2 SCC 66*** in support of the Petitioner's case. Ms. Manish thus submits that permission for re-export having been granted, the Respondent ought to be directed to waive the demurrage / rent charges.

Respondents' Submissions

13. The Respondent Nos.1 & 2 are the Principal Commissioner of Customs (Imports) and the Deputy Commissioner of Customs (Import Shed). The Delhi International Airport Private Limited is the Respondent No.3 and Celebi Delhi Cargo Terminal Management India Pvt. Ltd. is the Respondent No.4.

14. Mr. Rakesh Tiku, learned Senior advocate appearing on behalf of CELEBI submits that the reliance by the Petitioner on the order passed by the ACC (Import) is misplaced. Mr. Tiku submits that CELEBI being the party affected in this case ought to have been heard, inasmuch as, if waiver

of demurrage charge/ground rent is granted, it would be put to a loss. As per Mr. Tiku, since CELEBI was not heard prior to the passing of the order dated 13th January, 2017, the same was not binding upon CELEBI.

15. Mr. Tiku further relied upon Section 125 of the CA to argue that once a consignment is confiscated, the authorities did not have the power to waive fine or penalty and under the said provision, fine had to be mandatorily imposed in lieu of any confiscation. Mr. Tiku vehemently urges that the Court cannot countenance a position wherein, while holding that the consignment consisted of goods which were prohibited and hence confiscated, the authority had waived the imposition of fine, by completely ignoring the statutory provisions. Mr. Tiku further submits that even in the judgment of the Supreme Court in ***Grand Slam International (supra)***, the Supreme Court has clearly held that customs authorities would be entitled to charge demurrage for the imported goods even if the fault of non-clearance lies on the authorities.

16. The stand of the Respondent Nos.1 to 3 is that DIAL used to be the custodian of the imported goods when they arrive at the IGI airport, but with effect from 7th February, 2012, the services have been outsourced to CELEBI. It is their stand that the waiver policy, as framed by the Airport Authority of India (AAI), is no longer applicable after the appointment of CELEBI as the custodian.

Analysis and Findings

17. The first and the most important question that needs to be ascertained is

as to whether the export of the consignment to India was contrary to law or was it a bona fide mistake.

18. The Petitioner has placed on record the following documents -

(i) Invoice dated 23rd April, 2016 showing the recipients of the shipment as Visha Enterprises, B-6/4, 2nd Floor, Ramesh Nagar, New Delhi – 110015.

(ii) Airway Bill No.607-67933913 dated 23rd April, 2016 showing the consignee name and address of Visha Enterprises.

19. There is not a single document to support the Petitioner's case that the consignment was meant for Singapore and not for Delhi. The undated letter written by the Petitioner to the Manager of the Etihad Airlines, New Delhi reads:

> *"Dear Sir,*
> *I would like to bring to your kind notice that by mistake our dispatch team has released wrong cargo to New Delhi Airport via Awb bill no 607-67933913. As unfortunately pallets got exchanged at the time of delivery.*
> *Due to delay our order got cancelled So I request you to pls arrange to bring back our cargo. We will pay you all overhead expenses to bring back our shipment."*

Even as per this letter the Petitioner is requesting Etihad Airlines to bring back the cargo due to the delay and claims that there was an exchange of pallets.

20. There is nothing on record to support the case of the Petitioner that there was a bona fide mistake or that the goods were meant for Singapore and were wrongly brought to India. All the documents on record clearly reveal that there was a proper detailed invoice for the health products, which was raised on Visha Enterprises and was meant to be cleared by Visha Enterprises.

21. It is not in dispute that the consignment consisted of the health products, which at the relevant time were prohibited goods as per Section 22 of the FSSA which reads as under:

> *"Save as otherwise provided under this Act and Regulations made thereunder, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, neutraceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf.*
>
> *Explanation.–For the purposes of this section,–*
>
> *(1) "foods for special dietary uses or functional foods or nutraceuticals or health supplements" means:*
> *(a) foods which are specially processed or formulated to satisfy particular dietary requirements which exist because of a particular physical or physiological condition or specific diseases and disorders and which are presented as such, wherein the composition of these foodstuffs must differ significantly from the composition of ordinary foods of comparable nature, if such ordinary foods exist, and may contain one or more of the following ingredients, namely:–*

(i) plants or botanicals or their parts in the form of powder, concentrate or extract in water, ethyl alcohol or hydro alcoholic extract, single or in combination;
(ii) minerals or vitamins or proteins or metals or their compounds or amino acids (in amounts not exceeding the Recommended Daily Allowance for Indians) or enzymes (within permissible limits);
(iii) substances from animal origin;
(iv) a dietary substance for use by human beings to supplement the diet by increasing the total dietary intake;

(b) (i) a product that is labelled as a ―Food for special dietary uses or functional foods or nutraceuticals or health supplements or similar such foods‖ which is not represented for use as a conventional food and whereby such products may be formulated in the form of powders, granules, tablets, capsules, liquids, jelly and other dosage forms but not parenterals, and are meant for oral administration;
(ii) such product does not include a drug as defined in clause (b) and ayurvedic, sidha and unani drugs as defined in clauses (a) and (h) of section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940) and rules made thereunder;
(iii) does not claim to cure or mitigate any specific disease, disorder or condition (except for certain health benefit or such promotion claims) as may be permitted by the regulations made under this Act;
(iv) does not include a narcotic drug or a psychotropic substance as defined in the Schedule of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and rules made thereunder and substances listed in Schedules E and EI of the Drugs and Cosmetics Rules, 1945;

(2) "genetically engineered or modified food" means food and food ingredients composed of or containing genetically modified or engineered organisms obtained

through modern biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology;

(3) "organic food" means food products that have been produced in accordance with specified organic production standards;
(4) "proprietary and novel food" means an article of food for which standards have not been specified but is not unsafe: Provided that such food does not contain any of the foods and ingredients prohibited under this Act and the regulations made thereunder".

22. Under Section 111 (d) of the CA, goods which are prohibited under any law for the time being in force, are liable to be confiscated. Such goods fall in the category of `prohibited goods' under Section 2 (33) of the CA and any *import or attempt to import* the same, entails confiscation. The ACC (Imports), having confiscated the goods, could not have permitted the re-export of the same, as per law, without the imposition of fine or penalty. The confiscation of goods having not been challenged by the Petitioner, non-imposition of penalty/fine is clearly erroneous and unsustainable. It is the admitted position that the consignment consisted of prohibited goods and the same having arrived in Delhi and having been confiscated, the Petitioner being the owner of the goods, has to take the responsibility for the same.

23. The submission that the same was a bona fide mistake clearly appears to be an afterthought. This stand of the Petitioner is not borne out from any contemporaneous documents on record. There is no invoice, airway bill, purchase order or any other document stating that goods were meant to be

delivered to a Singapore based customer. The Petitioner has failed to make out a case of bona fide mistake and the findings of the ACC (Imports) to the said effect are unsustainable in law. The non-imposition of fine is also contrary to a bare reading of Section 125 of the CA which reads:

> "*125. Option to pay fine in lieu of confiscation – (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof if prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit:*
>
> *Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.*
>
> *[(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) of the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.*"

24. Mere non-imposition of penalty/fine, which is the mandate under Section 125 of the CA in case of confiscated goods, cannot automatically result in letting the Petitioner go scot-free. The ACC (Imports) had no discretion not to impose fine as the provision clearly provides that ***"officers.......... shall .... give to the owner of the goods.......... an option to pay in lieu of confiscation such fine as the said officer thinks fit..........."***. Thus, the imposition of fine under Section 125 was a logical and mandatory

consequence once the goods were confiscated. Once the fine is imposed, the owner of goods is liable to any duty and charges payable in respect of the said goods under Section 125 (2) of the CA.

25. The question that then arises is whether the Petitioner is entitled to waiver of demurrage/rent charges. This issue is no longer *res integra*. In ***Trip Communication*** (***supra***), this Court has discussed the law on the subject after taking into account the various prevalent policies etc. The Court has held as under:

> "…..
> *44. The policy makes a distinction between the cases where the importer is innocent but his imported goods are seized and detained pending an enquiry and adjudication and the case where the importers have indulged in misdeclaration, misdescription, undervaluation or concealment and fine, penalty, personal penalty and/or warning is imposed by the customs authorities. Importers who are innocent cannot be equated with the importers who violate the law and be given the same treatment. The AAI policy makes a distinction between the two and in our view rightly so.*
> …………
> *47. In cases where the importer is found innocent and there is no imposition of any fine, penalty, personal penalty and/or warning by the customs authorities, the Policy for Waiver would be applicable and the importer would be entitled to be considered for its benefit provided a certificate entitling him to be so considered is issued by the custom authorities. The importer would not be automatically exempt but would be covered under the Policy for Waiver and eligible for waiver which would be granted subject to other compliances.*

> ....
> *49. Where the importer is clearly at fault and fine, penalty, personal penalty and/or warning is imposed by the customs authorities, making the regulations applicable and granting the benefits of waiver would be clearly unreasonable and would grant benefit of waiver, with the person who has provided space suffering. This was and is not the intention and purpose behind HCCAR. Regulation recognises and accepts that any other law in force is not abrogated or repealed. The existing provision applicable stands protected."*

The above decision clearly holds that there would be no automatic exemption of demurrage/rent charges.

26. In the present case, the arrival of the consignment in Delhi, which contains prohibited goods, is clearly not innocent and is contrary to law. The goods being prohibited goods and having been confiscated, even as per ***Trip Communication***, the Petitioner would not be entitled to waiver of demurrage/rent charges. The Petitioner, having accepted the finding that the consignment contained prohibited goods and was liable for confiscation, cannot claim waiver of demurrage/rent charges to the detriment of CELEBI, which was not even heard by the ACC (Imports). None of the decisions, relied upon by the Petitioner, would support the position that is being canvassed by the Petitioner.

27. The Regulations relied upon by the Petitioner do not come to the Petitioner's rescue as the same do not apply in the case of goods which are confiscated and Regulation 6 (1) (l) is itself "subject to any other law for the

time being enforced”. Thus, the Regulations are subject to the provisions of the CA.

28. The judgment in ***Garden Silk Mills*** (***supra***) does not come to the aid of the Petitioner, inasmuch as, para 18 of the said judgment relates to the taxable event after import and does not deal with the payment of demurrage /rent charges while the goods are under detention. Moreover, Section 111(d) applies not just to *`imports'* but even *`attempts to import'*. Even in the case of ***Sampat Raj Dugar (supra)***, the Supreme Court while holding that the exporter is the owner of the goods, permitted re-export *“in accordance with law and subject to payment of such dues or other charges as may be leviable in that behalf*”. In ***Grand Slam (supra)*** it was unequivocally held that that the custodian of the goods would be entitled to charge demurrage for the goods in its custody.

29. In fact, ***Grand Slam (supra)*** has been followed subsequently in ***Trustees of Port of Madra v. Nagavedu Lungi & Co., (1995) 3 SCC 730*** wherein the Supreme Court held that the liability to pay demurrage charges or incidental charges as per ***Grand Slam (supra)*** applies equally to exporters/consigners of goods.

29A. In view of the above, this Court concludes that the consignment having contained `prohibited goods', which were confiscated in terms of Section 111 (d) of the CA, the Petitioner is not entitled for re-export of the same without payment of demurrage/ground rent.

30. Accordingly, it is directed as under:

(a) Respondent no. 4 - CELEBI is directed to communicate to the Petitioner the amount of demurrage/ground rent positively within a week.

(b) Upon payment of the same by the Petitioner, the Petitioner be permitted to re-export the goods imported against Airway Bill No.607-67933913 dated 23rd April, 2016.

(c) Upon failure by the Petitioner to make payment of the demurrage/ground rent, Respondent No.4 will proceed to deal with goods in accordance with law.

31. The writ petition and the pending application are disposed off in the above terms. In the facts and circumstances of the present case, there would be no order as to the costs.

PRATHIBA M. SINGH, J

S.MURALIDHAR, J

AUGUST 02, 2017
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