IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3676 OF 2020

Supreme Industries Limited ... Petitioner
V/s.
Central Board of Indirect
Taxes and Customs and ors. ... Respondents

Mr.Ashwin Gopakumar i/by Mr.Ankit Kulkarni, Advocates for the Petitioner.
Mr.Anil C. Singh, Additional Solicitor General alongwith Mr.Pradeep S. Jetly, Senior Advocate and Mr.Jitendra B. Mishra, Advocates for Respondent Nos.1,2,3 and 6 to 11.
Mr.Prathamesh Kamat, Advocate for Respondent No.4.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
Reserved on : JANUARY 15, 2021.
Pronounced on: MARCH 08, 2021.

JUDGEMENT AND ORDER : (Per Ujjal Bhuyan, J.)

Heard Mr.Ashwin Gopakumar, learned counsel for the petitioner; Mr.Anil C. Singh, learned Additional Solicitor General for respondent Nos.1,2,3 and 6 to 11; and Mr.Prathamesh Kamat, learned counsel for respondent No.4.

2. This petition has been filed under Article 226 of the Constitution of India seeking the following reliefs :-

> a. For a direction to the respondents to strictly implement and enforce the detention cum demurrage waiver certificate dated 16th November, 2020 annexed to the writ petition as Ex.Q.
> b. For a direction to the respondents to allow, facilitate, oversee and ensure clearance of the imported goods of the petitioner for home consumption by taking appropriate action against respondent Nos.4 and 5.

c. For a direction to respondent No.1 to conduct an inquiry into the various acts of omissions and commissions by respondent Nos.6 to 11.
d. For a direction to respondent Nos.2 to 11 to compensate the loss sustained by the petitioner for their unlawful action;
e. Awarding of cost to the petitioner.

3. According to the petitioner, it is a public limited listed company incorporated under the Indian Companies Act, 1913. It is in the plastic industry with a variety of applications in moulded furniture, storage and material handling products, XF films and products, performance films, industrial moulded products, protective packaging products, composite plastic products, plastic piping system and petrochemicals. In recognition and appreciation of the efforts of the petitioner in securing the international supply chain while complying with the framework of safety standards, Central Board of Indirect Taxes and Customs (briefly "the Board" hereinafter) has certified the petitioner as authorized economic operator-T2 (importer and exporter) under the Board's circular No.33 of 2016-Customs dated 22nd July, 2016 having validity upto 23rd July, 2022.

4. Petitioner offers a wide range of plastic products in India manufactured at its various plants.

5. For the purpose of its business petitioner placed purchase order dated 6th May, 2020 on a foreign supplier at Texas, United States of America for supply of 1000 metric tons of PVC resin 1230P. On reaching the Nhava Sheva seaport petitioner filed Bill of Entry No. 8389492 dated 6th August, 2020 declaring the imported goods under Customs Tariff Heading (CTH) 39041020. Petitioner sought release of the goods for home consumption by

making self declaration of the value of the goods and on payment of full duty on the declared value.

6. Petitioner has alleged that respondent Nos.10 and 11 on extraneous consideration had raised frivolous queries and tried to build up a case of undervaluation by noting that the unit price of the imported cargo in the commercial invoices was lower than the rates found in the website of *S & P Global Platts* and on such untenable grounds the goods of the petitioner were withheld.

7. Petitioner was aggrieved by non-clearance of the goods which resulted in expiry of free time allowed by the shipping line and container freight station for clearance of the imported cargo, attracting huge charges in the form of container detention charges, ground rent etc.

8. With this grievance petitioner had approached this court by filing a writ petition which was registered as Writ Petition (St.) No. 92578 of 2020.

9. Notice in this case was issued by this court on 10th September, 2020.

10. In the reply affidavit customs authorities stated that the Bill of Entry No.8389492 dated 6th August, 2020 filed by the petitioner was adjudicated by the Additional Commissioner of Customs, Nhava Sheva on 4th September, 2020. The adjudicating authority rejected the value of the imported goods declared by the petitioner and re-determined the same at Rs.2.63 crores with a fine of Rs.8 lakhs under section 125 of the Customs Act, 1962 (briefly "the Customs Act", hereinafter) besides imposing penalty of Rs.80,000/- under section 112(a) of the Customs Act. Though

copy of the order of the adjudicating authority was not annexed to the reply affidavit, it was stated that the bill of entry was finally assessed on 9th September, 2020.

11. Later on a copy of the order-in-original was placed before the court showing the date of order in original as 4th September, 2020.

12. On 29th September, 2020 this court noted that the order-in-original dated 4th September, 2020 was issued on 24th September, 2020. It was further noted that the goods had been confiscated though option was given to the petitioner to redeem the goods on payment of redemption fine and penalty.

13. The order-in-original dated 4th September, 2020 was subsequently brought on record by the petitioner.

14. In the proceedings held on 6th October, 2020 this court noted that while the date of the order-in-original was 4th September, 2020, the date of issue was mentioned as 24th September, 2020. Adjudicating authority had signed the order on 24th September, 2020 which *prima facie* meant that the order was passed on 24th September,2020. Various discrepancies discernible in the reply affidavit was pointed out including query reply given by the petitioner on 9th September, 2020, whereafter final assessment of the bill of entry was made on 9th September, 2020. Therefore, this court observed that the order-in-original could not have been passed on 4th September,2020. In the circumstances, adjudicating authority was directed to file an affidavit and also to produce the record.

15. In response to the court's order dated 6th October, 2020, the adjudicating authority Mr.Kamlesh Kumar Gupta, Additional Commissioner filed an affidavit. The record in original was also produced.

16. After hearing the matter this court vide the judgment and order dated 27th October, 2020 set aside the order-in-original dated 4th September, 2020 signed on 24th September, 2020 and issued on 24th September, 2020 *in toto*. Further, this court directed the Principal Chief Commissioner of Customs to depute another officer in place of the then adjudicating officer to hear the case of the petitioner afresh and thereafter, to pass a speaking order within a period of two weeks. In the meanwhile, the parties were directed to maintain *status-quo* in respect of the goods in question. However, no opinion was expressed on merit.

17. Following the judgment and order passed by this court a fresh order-in-original dated 6th November, 2020 was passed by the Joint Commissioner of Customs, Nhava Sheva-III. In the order-in-original dated 6th November, 2020 the Joint Commissioner of Customs found that no worthwhile investigation was conducted to reject the transaction value and that value of contemporaneous imports from the same overseas supplier for the same commercial quantity for the same period was not available. It has been held that the enhancement without evidence to the contrary was clearly improper. Though invoice price is not sacrosanct, casting aspersions on invoice produced by the importer is not sufficient to reject it as evidence of value. In the absence of any evidence, price quoted in *Platts* cannot be the sole basis to enhance declared price. Therefore, he concluded that the transaction value was enhanced arbitrarily without any evidence on record and that he did not find any merit in the enhanced

value. In the circumstances he held that value of the imported goods declared in the bill of entry merited acceptance. He therefore rejected the enhancement of value and accepted the invoice value, ordering the goods to be released as such. Since the main allegation of under valuation did not survive, the other aspects were not gone into. Joint Commissioner of Customs further observed that request for waiver of demurrage was required to be addressed by the jurisdictional Commissioner of Customs to whom a copy of the order-in-original dated 6th November, 2020 was endorsed for doing the needful.

18. On 6th November, 2020 itself petitioner submitted representation to the Principal Chief Commissioner of Customs, i.e. respondent No.2 requesting the said authority to urgently issue detention certificate(s) in accordance with Regulation 10 of the Sea Cargo Manifest and Transhipment Regulations, 2018 and Regulation 6 of the Handling of Cargo in Customs Areas Regulations, 2009 by directing the shipping line and the container freight station under whose custody the cargo was lying not to charge any rent or demurrage in respect of the goods under consideration for the period from 7th August, 2020 to the date of issuance of the detention certificate(s).

19. On 10th November, 2020 Deputy Commissioner of Customs Group-2G i.e. respondent No.3 issued Detention cum Demurrage Waiver Certificate to respondent Nos.4 and 5. It was mentioned that since the goods were under consideration for adjudication, hence recommendation was made for waiver of detention and demurrage charges till 10th November, 2020 under section 45 read with section 141 (2) of the Customs Act and under Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations,

2009 further clarifying that the said certificate was issued as per public notice No.26 of 2010 dated 2nd March, 2010.

20. It appears that there were a series of correspondence between the petitioner on the one hand and respondent No.4 on the other hand through e-mail on the subject of detention waiver. Vide e-mail dated 16th December, 2020 petitioner was informed by respondent No.4 that there was a contract of carriage between petitioner and the principal of respondent No.4 as customer and carrier. It was pointed out that in terms of the contract petitioner had agreed and undertook to pay all contractual charges including but not limited to detention charges. It was also mentioned that the provisions of Handling of Cargo in Customs Areas Regulations, 2009 do not apply to container shipping lines since shipping lines are not customs cargo service providers. Petitioner was also informed that any further delay in retaining the containers would continue to be at the cost and consequence of the petitioner.

21. In the meanwhile, petitioner through its lawyer had issued notice to respondent Nos.6,7,9,10 and 11 on 11th November, 2020 calling upon the said officers to issue detention certificate(s) or such other proceedings that are valid and are in accordance with Regulation 10 of the Sea Cargo Manifest and Transhipment Regulations, 2018 and Regulation 6 of the Handling of Cargo in Customs Areas Regulations, 2009 by directing the shipping line and the container freight station under whose custody the imported goods of the petitioner were lying not to charge any rent or demurrage on the said goods for the period from 7th August, 2020 to the date of issuance of the detention certificate(s).

22. Following the above representation, respondent No.3 issued detention cum demurrage waiver certificates dated 16th

November, 2020 addressed to respondent Nos.4 and 5. Reference was made to the earlier detention cum demurrage waiver certificate dated 10th November, 2020. The two authorities were informed that the imported goods are detained goods and therefore, it was clarified that they should not demand any rent or detention charges or demurrage charges for the containers laden with the goods. Specific direction was issued not to charge any rent or detention charges or demurrage charges and thus to facilitate clearance of the goods immediately. In the said certificates it was pointed out that this court in its order dated 27th October, 2020 had directed maintenance of *status-quo* in respect of the subject goods. It was mentioned that issuance of the said certificates had the approval of Principal Commissioner i.e. respondent No.2.

23. Notwithstanding issuance of the above certificates respondent Nos.4 and 5 did not release the goods of the petitioner which compelled the petitioner to serve upon them pleader's notice dated 23rd November, 2020 whereby the said authorities were called upon to comply with the detention cum demurrage waiver certificates dated 16th November, 2020 and to forthwith issue delivery order for clearance of the goods immediately. Similar pleader's notice was issued to respondent No.2 by the petitioner on 25th November, 2020 but without any effect.

24. Aggrieved, present writ petition has been filed seeking the reliefs as indicated above.

25. Mr.Sanjay Mahendra, Commissioner of Customs (General) Nhava Sheva has filed reply affidavit for and on behalf of respondent Nos.2,3 and 7 to 11. At the outset, he has raised an objection regarding impleadment of respondent Nos.7 to 11 by name contending that they had discharged their duties in their

official capacity. As such they should not have been arrayed as respondents by name. Prayer has been made for deletion of their names from the array of respondents.

26. Deponent has denied the allegations of malafide intention or abuse of power and position for extraneous consideration by the respondents.

27. It is stated that the first adjudicating authority had passed the order-in-original on the basis of facts submitted by the petitioner. This court in the order dated 27th October, 2020 did not comment on the merit of the order-in-original and had set aside the order-in-original because of the difference in the dates of issue of order and passing of order. Therefore, it is not correct to say that order of the first adjudicating authority was arbitrary or was passed with malicious intention.

28. Answering respondents have stated that shipping lines carry goods on behalf of the traders. The transfer of custodianship of goods has a specific time period and the charges are levied accordingly. Detention and demurrage charges are levied by the shipping company on the basis of the tariff decided by the shipping company.

29. Following the order of this court dated 27th October, 2020, order-in-original was again passed on 6th November, 2020 by a different officer, whereafter out of charge was granted on 9th November, 2020. Thus, there was no delay on the part of the customs in releasing the goods. However, it is stated that the importer had an option to avail warehousing of goods under section 49 of the Customs Act in order to reduce detention and demurrage charges.

30. In so far the first order-in-original is concerned reference has been made to observations of the RMS Facilitation Centre which indicated under invoicing of the goods. Petitioner submitted letter dated 27th August, 2020 requesting waiver of show cause notice and personal hearing; further requesting valuation of the goods as per *Platt* rate after allowing for 10% variation. On that basis and after considering *S & P Global Platts* valuation the first order-in-original was passed.

31. After the fresh order-in-original was passed on 6th November, 2020, respondent No.2 requested the jurisdictional Principal Commissioner of Customs, Nhava Sheva-I vide letter dated 9th November, 2020 to decide the request for waiver of detention and demurrage charges and to submit action taken report immediately. Further, respondent No.2 acting on the petitioner's letter dated 3rd November, 2020 had directed the Customs Intelligence Unit in the office of the Commissioner of Customs (General), Nhava Sheva to investigate into the allegations made by the petitioner. Investigation is in progress.

32. Acting promptly on the second order-in-original dated 6th November, 2020, a letter dated 10th November, 2020 was issued by the Deputy Commissioner of Customs Group-2G for waiver of detention and demurrage charges. However, the shipping line replied to the same vide letter dated 12th November, 2020 stating that petitioner had entered into a contract of carriage with its principal and therefore, it is under contractual obligation to pay all the charges relating to storage of the goods. It was clarified that the request of the department was not binding on the shipping line also stating that any further delay in returning the

containers will continue to be at the consignee's cost and consequence.

33. When the petitioner raised a grievance with regard to the detention certificate dated 10th November, 2020, respondent No.2 issued letter dated 16th November, 2020 to the jurisdictional Commissioner of Customs to take corrective action. Accordingly, detention cum demurrage certificates dated 16th November, 2020 was issued by respondent No.3 directing the container freight station and the shipping line not to charge any detention cum demurrage charges on the goods laden containers of the petitioner as per Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009 as well as under Regulation 10(1)(l) of the Sea Cargo Manifest and Transhipment Regulations, 2018.

34. Office of the Commissioner of Customs (General) Nhava Sheva took up the matter with the concerned cargo freight station and vide letter dated 17th December, 2020 asked it to honour the detention cum demurrage certificate forthwith. Chief Executive Officer of the customs freight station in his letter dated 17th December, 2020 stated that they would honour the detention cum demurrage waiver certificate after receiving the valid documents. It is stated that the consignment was already given out of charge by customs on 9th November, 2020. Only compliance from the shipping line, namely, M/s Ocean Network Express (India) Private Ltd. i.e., respondent No.4 is pending. Since the shipping line failed to respond to the detention cum demurrage waiver certificate dated 16th November, 2020, explanation from the shipping line was called for vide letter dated 17th December, 2020. Respondent No.4 vide their letter dated 18th December, 2020 replied that they were not obliged to grant

waiver of detention charges as the grounds set forth in the detention cum demurrage certificate do not qualify for grant of waiver under Regulation 10(1)(l) and (m) of the Sea Cargo Manifest and Transhipment Regulations, 2018. Thereafter, show cause notice dated 1st January, 2021 has been issued to the shipping line M/s Ocean Network Express (India) Private Limited to show cause as to why the registration approval should not be revoked and as to why penalty should not be imposed. Therefore, it is contended that Commissionerate of Customs (General), Nhava Sheva has taken prompt and firm action for waiver of detention and demurrage charges.

35. Denying all averments and allegations made in the writ petition, answering respondents seek dismissal of the writ petition.

36. Respondent No.4 has filed reply affidavit through one Mr. Ashutosh Madhav Purohit. At the outset respondent No.4 has raised preliminary objection as to maintainability of the writ petition. It is contended that petitioner is seeking a writ of mandamus against respondent No.4 which is a private party. That apart, petitioner is seeking enforcement of a writ in a contractual matter binding the petitioner and the principal of which respondent No.4 is only an agent. Since the dispute of the petitioner is with the principal, no relief can be sought for against the agent i.e., respondent No.4. Principal is Ocean Network Express Private Limited (in brief 'Ocean' hereinafter). Ocean has not been arrayed as a respondent in the writ proceeding whereas the agent has been made respondent No.4. Respondent No.4 has no privity of contract with the petitioner. Therefore, in the absence of the principal, writ petition against the agent would not be maintainable. Thus, the writ petition is hit by non-joinder of necessary party i.e., Ocean and by

mis-joinder of the agent as a respondent. It is further contended that petitioner cannot contend violation of any fundamental right such as right under Article 19(1)(g) of the Constitution of India against respondent No.4 which is a private entity. Relief sought for by the petitioner, if granted, would tantamount to interference in a privately negotiated contract between the parties. On the issue of payment of container detention charges, parties had privately negotiated which is reflected in the contract of carriage between the petitioner and Ocean through the bill of lading.

37. On merit, stand taken by respondent No.4 is that on 4th June, 2020, Ocean had issued a bill of lading evidencing carriage of 20800 bags of PVC resin 1230P packed in 20 containers. This bill of lading endorsed to the petitioner constitutes the contract of carriage between the petitioner and Ocean. Bill of lading provided for free time of 14 days at the destination for return of the empty containers. If the containers were not returned within the prescribed period, the importer (in this case the petitioner) would be liable for detention charges.

38. It is stated that on 8th August, 2020 the goods were discharged at Nhava Sheva port and on 10th August, 2020 respondent No.4 provided the petitioner with a delivery order for taking delivery of the goods. The contractual free time expired on 22nd August, 2020 but the empty containers were not returned. Therefore, in terms of the contract, detention charges began to accrue.

39. On 19th October, 2020 respondent No.4 had emailed the petitioner informing that the containers had remained uncleared for 64 days and requested clearance at the earliest. However, respondent No.4 was informed by the customs housing agent of the

petitioner that petitioner had approached the High Court against withholding of the goods by the customs authority on the ground of under invoicing.

40. On 10th November, 2020 the customs housing agent of the petitioner emailed respondent No.4 the detention cum demurrage waiver certificate dated 10th November, 2020 issued by the customs authority. The said certificate was issued by the customs authority to respondent Nos.4 and 5 for waiver of detention / demurrage charges for the goods till 10th November, 2020 under various provisions of the Customs Act and Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009 (briefly 'the 2009 Regulations' hereinafter). It is stated that provisions of the 2009 Regulations are not applicable to respondent No.4 or its principal.

41. Respondent No.4 informed the customs housing agent of the petitioner *vide* emails dated 10th November, 2020 and 11th November, 2020 that the petitioner was contractually bound to pay the charges levied by respondent No.4. It was further contended that the 2009 Regulations were not applicable to respondent No.4 as it was not a customs cargo service provider defined in the 2009 Regulations. Clarifying that respondent No.4 would be unable to provide waiver of detention charges, respondent No.4 requested clearance of the goods at the earliest after payment of the applicable detention charges.

42. Thereafter respondent No.4 issued a letter to respondent No.3 on 12th November, 2020 to the effect that petitioner was contractually bound to pay the charges levied. 2009 Regulations were not applicable to respondent No.4 as it was not a customs cargo service provider.

43. On 16th November, 2020 respondent No.3 issued another detention cum demurrage waiver certificate to respondent No.4 clarifying that reference to the 2009 Regulations in the earlier detention cum demurrage waiver certificate dated 10th November, 2020 was for respondent No.5, further certifying the goods as detained goods. Respondent No.4 was directed not to levy any detention charges as per Regulation 10(1)(l) of the Sea Cargo Manifest Transhipment Regulations, 2018 (briefly 'the 2018 Regulations).

44. Referring to the pleader's notice issued by the lawyer of petitioner to respondent No.4, it is stated that respondent No.4 had issued letter dated 18th December, 2020 through its lawyer to respondent No.3 disputing the detention cum demurrage waiver certificates dated 10th November, 2020 and 16th November, 2020 on the grounds stated therein. This was followed by another such letter dated 21st December, 2020, this time making it clear that petitioner is contractually liable to settle the container detention charges in full. In any event, the direction to respondent No.4 in the detention cum demurrage waiver certificate dated 16th November, 2020 not to charge any detention charges was not in terms of Regulation 10(1)(l) of the 2018 Regulations.

45. Respondent No.4 has also referred to the show cause notice dated 1st January, 2021 whereby respondent No.4 has been asked to show cause as to why its registration approval should not be revoked and penalty should not be imposed. In this connection, it has contended that there cannot be multiple proceedings against respondent No.4.

46. Respondent No.4 has responded to the averments made by the petitioner paragraph-wise and has denied the same. Finally it is contended that respondent No.4 cannot be made responsible or liable for the alleged loss suffered by the petitioner. Respondent No.4, therefore, seeks dismissal of the writ petition.

47. Mr.Gopakumar, learned counsel for the petitioner submits that a perusal of this court's order dated 27th October, 2020 in the earlier writ petition filed by the petitioner would go to show the absolute non-application of mind on the part of the adjudicating authority who had passed the first order-in-original. It is evident that petitioner was subjected to severe harassment by the customs authorities for not meeting the extraneous demands of some of the field officials including respondent Nos.10 and 11. The fact that this court had quashed the first order-in-original itself is indicative of the manifest procedural error which vitiated the said order. This court despite exercising complete restraint could not deprecate the conduct of the adjudicating authority, which clearly suggested unfairness and arbitrariness. The fact that petitioner was subjected to harassment has been buttressed by the subsequent order-in-original dated 6th November, 2020. The new adjudicating authority clearly held that the transaction value was enhanced arbitrarily without any evidence on record whereafter he has held that the declared value of the imported goods as per the bill of entry merited acceptance.

48. Mr.Gopakumar has extensively relied upon sections 45 and 141 of the Customs Act to contend that all imported goods unloaded in a customs area are subject to control of officers of the customs. Therefore, it is the duty of the customs officers to ensure that the imported goods of the petitioner are cleared at the earliest. In the present case, petitioner has suffered huge

demurrage and detention charges because of wrongful enhancement of the declared value of the goods. In such circumstances, he submits that it is the duty of the customs authorities to ensure that respondent Nos.4 and 5 duly comply with the detention cum demurrage waiver certificates otherwise it would amount to compelling the petitioner to pay detention cum demurrage charges for the period when the imported goods of the petitioner remained in the custody of respondent Nos.4 and 5 because of wrongful action of the customs authorities. In this connection, he has also referred to Regulation 6(1)(l) of the 2009 Regulations and Regulation 10(1)(l) of the 2018 Regulations. He, therefore, submits that present is a fit case where this court may direct all the respondents to forthwith release the goods of the petitioner without insistence on payment of detention or demurrage charges. He further submits that despite petitioner having an impeachable record as a reputed importer and exporter, it has been subjected to unlawful harassment which needs to be investigated and the erring officials needs to be punished in accordance with law. Investigation stated to be initiated by respondent No.2 is nothing but an eye-wash.

49. Mr.Anil Singh, learned Additional Solicitor General appearing for respondent Nos.1, 2, 3 and 6 to 11 at the outset has referred to the prayer portion in the writ petition wherefrom he submits that the principal reliefs sought for by the petitioner are against respondent Nos.4 and 5. In so far official respondents are concerned, he has taken us to page 113 of the paper-book which is a detention cum demurrage waiver certificate dated 16th November, 2020 issued by respondent No.3 and addressed to respondent No.5, which is the customs freight station. As per the said certificate, the imported goods were detained by the customs authorities for the purpose of verifying the entries made in the bill

of lading. This court in the order dated 27th October, 2020 had directed maintenance of *status-quo* in respect of the subject goods. It was clarified that the subject goods are the detained goods and, therefore, as per Regulation 6(1)(l) of the 2009 Regulations, respondent No.5 was directed not to charge any rent or demurrage charges and facilitate clearance of the goods. Similar certificate has been issued to respondent No.4 under Regulation 10(1)(l) of the 2018 Regulations. He, therefore, submits that the official respondents on their part had done whatever was required to be done. When it was found that respondent No.4 was not complying with the detention cum demurrage waiver certificate, show cause notice has been issued to it. Justifying the initial detention, he has referred to paragraphs 9.1 to 9.5 of the reply affidavit of the official respondents. Besides, he has also referred to petitioner's letter dated 27th August, 2020 addressed to respondent No.3. By the said letter, petitioner while waiving the requirement of show cause notice and personal hearing had requested respondent No.3 to apply the value as per *Platt* - rate by giving 10% variation as per standing order No.7493 of 1999 dated 3rd December, 1999 and subsequent standing order No.44 of 2016 dated 8th July, 2016. He would, therefore, contend that the initial enhancement of transactional value was to a certain extent on account of request made by the petitioner itself; therefore, it would not be correct to say that the official respondents alone were responsible for the entire period of detention of the goods of the petitioner. His contention is that while petitioner can seek its remedy against respondent Nos.4 and 5, no relief can be claimed against the official respondents. However, on a point of law he has placed reliance on a decision of the Supreme Court in **Mumbai Port Trust Vs. Shri Lakshmi Steels, 2017(352) ELT 401**, and contends that even if the importer is not at fault it is the importer alone who is liable to pay the demurrage or detention charges.

50. Mr.Kamat, learned counsel for respondent No.4 after highlighting the preliminary objections, submits that respondent No.4 is not a customs cargo service provider. Therefore, the 2009 Regulations would not be applicable to it. In fact, by issuing the detention cum demurrage waiver certificate dated 16th November, 2020, this aspect has been acknowledged by respondent No.3. There is no question of respondent No.4 being in breach of or violating provisions of the 2018 Regulations as the detention cum demurrage waiver certificate dated 16th November, 2020 is not in terms of the said Regulations. He has particularly referred to Regulation 10 of the 2018 Regulations which deals with responsibilities of the authorized carrier. In this connection, learned counsel for respondent No.4 has referred to page 176 of the paper-book and submits that respondent No.4 had written to respondent No.3 on 12th November, 2020 stating that petitioner had contracted with its principal i.e., Ocean for carriage of containerized cargo as per the agreed terms of the contract of carriage between customer and carrier; the customer had *inter alia* agreed and undertook to pay all contractual charges including but not limited to detention charges. Therefore, petitioner being the customer is contractually liable to pay detention charges and other charges as per the contract. He submits that respondent No.4 is not a customs cargo service provider as defined in Regulation 2(b) of the 2009 Regulations. In support of his submissions, learned counsel for respondent No.4 has referred to the bill of lading dated 4th June, 2020 and the terms and conditions therein including paragraph 12.13 of the bill of lading. Referring to the Indian Bills of Lading Act, 1856 more particularly to section 3 thereof, he contends that bill of lading in the hands of the consignee would be construed to be conclusive evidence of the shipment as against the master etc.

51. Mr.Kamat has submitted two compilations and relies upon the following decisions:-

(1) *Shipping Corporation of India Limited Vs. C. L. Jain Woolen Mills*, **(2001) 5 SCC 345**;

(2) *All India Power Engineering Federation Vs. Sasan Power Limited*, **(2017) 1 SCC 487**;

(3) *J. J. Polyplast Private Limited Vs. Ministry of Shipping*, **Writ Petition No.2973 of 2014** decided on **30.06.2018**; and

(4) *Mumbai Port Trust Vs. Shri Lakshmi Steels*, **(2018) 14 SCC 317**.

52. Mr.Gopakumar in his reply submits that respondents cannot hide behind technicalities and make the petitioner suffer by levying detention and demurrage charges for such period when the detention was on account of wrongful action of the official respondents. He has particularly referred to Regulation 10(1)(l) of the 2018 Regulations to contend that it is one of the responsibilities of the authorized carrier not to demand any container detention charges for the containers laden with goods detained by the customs authorities for the purpose of verifying the entries if the entries are found to be correct which has exactly happened in the present case. Mr.Gopakumar has also refuted the objections raised by respondent No.4 and submits that the customs authority exercises sufficient control over respondent No.4; therefore, it is not open to respondent No.4 to say that it would not comply with the detention cum demurrage waiver certificate of respondent No.3. Since the rights of the petitioner have been infringed, petitioner has rightly approached this court and is entitled to the reliefs sought for.

53. Submissions made by learned counsel for the parties have received the due consideration of the court.

54. In this case the bill of entry was filed on 6th August, 2020. After self assessment and payment of full duty on the declared value of the imported goods petitioner sought release of the goods for home consumption. However, the goods were not released. This led the petitioner to file Writ Petition (St.) No.9257 of 2020. During pendency of the writ petition court was informed by the respondents that the bill of entry filed by the petitioner was adjudicated by the Additional Commissioner on 4th September, 2020. Subsequently, copy of the order in original was brought on record. Though the order-in-original was dated 4th September, 2020, it was stated that bill of entry was finally assessed on 9th September, 2020 whereafter the order-in-original was issued on 24th September, 2020. Before we refer to the observations and findings of this court in respect to the order-in-original, we may mention that by the said order-in-original adjudicating authority had rejected the value of the imported goods declared by the petitioner and redetermined the same at Rs.2.63 crores with fine of Rs.8 lakhs under section 125 of the Customs Act, besides penalty of Rs.80,000/- imposed under section 112(a) of the Customs Act.

55. Regarding the apparent discrepancies in the order-in-original i.e. it was shown as dated 4th September, 2020, bill of entry finally assessed on 9th September, 2020 and issued on 24th September, 2020, this court after examining the affidavit filed by the adjudicating authority Mr.Kamlesh Kumar Gupta observed as under:-

> “18. The statement made in the aforementioned paragraphs quite surprises us to say the least. To say

that on 4th September, 2020, the operative part of the order was recorded and that the reasons/ discussion and findings would come later is to put the cart in front of the horse rather than behind it. We are unable to comprehend as to how without dealing with the facts and without giving reasons, the operative part of a quasi judicial order can be arrived at or even recorded. According to us, this kind of approach by a quasi judicial authority is not only shocking but also against the basic tenets of conduct by quasi judicial authorities.

56. Going deeper into the affidavit filed by the said adjudicating authority, court further noted as under :-

"21. From the above, we note that the Commissioner concerned has made contradictory statements; on the one hand, he submits that the operative part was recorded on 4th September, 2020 and the typed speaking order with discussion and findings was signed on 24th September, 2020, on the other hand, he says in paragraph 10 that the bill of entry was finally assessed on 9th September, 2020 as per adjudication order. We are unable to comprehend as to how after an order is signed on 24th September, 2020 (sic) that an assessment could be done on 9th September, 2020."

57. Finally it was held as under :-

"23.1 * * * * * * * *
We would have expected that an officer of the rank of Additional Commissioner who is discharging quasi judicial function under the Customs Act to have atleast read the section before stating what has been stated in paragraph 13 of his affidavit.

24. Despite exercising complete restraint, we cannot help but say that the entire conduct of the officer suggests a complete non-application of mind which to say the least must be deprecated. We feel that this entire saga was wholly avoidable. When the Court had issued notice on 10th September, 2020 and had passed the order on 22nd September, 2020 stating that the interim application would be taken up for consideration on 24th September, 2020, the concerned officer ought to have informed the Court about the status of the adjudication process and ought to have sought the

> leave of the Court for issuance of the order-in-original. It needs no reiteration that an officer conferred adjudicatory authority exercises quasi-judicial powers while passing adjudication order. He has to discharge his duties in a fair, proper and judicious manner befitting his status as an adjudicating authority. We say this much and no more.
>
> 25. * * * * * * * * *
> Revenue authority cannot at their own whim and fancy, split an order viz. first pass the operative part of the order without any discussion or finding or reasons and then pass the speaking order with discussion and findings and conveniently choose dates such as in this case.
> * * * * * * * * * *
> According to us, this type of conduct is not acceptable in conducting the affairs of the Revenue. If this Writ Petition had not been filed and if this Court had not passed the order dated 06th October 2020, requiring the Officer to clear the confusion of the dates, neither this Court nor the Petitioner would have ever known the manner in which the Revenue- Authority pass orders."

58. Under such circumstances, this court set aside the order-in-original and directed the Commissioner to depute another officer to hear the case of the petitioner and thereafter, to pass the order-in-original afresh. In the interregnum parties were directed to maintain *status-quo* in respect of the goods in question. It was held thus:-

> "32. In view of the above discussion and the circumstances of the case, we are left with no choice but to set aside the order in original dated "4th September, 2020 signed on 24th September, 2020 and issued on 24th September, 2020" *in toto*. Also in view of the above discussion, we direct the Respondent No.2 to depute another Officer in place and instead of the present Officer to hear the case of the Petitioner and after giving an opportunity of personal hearing pass a speaking order with reasons in accordance with law within a period of two weeks from the date of this order. In the meanwhile, parties to maintain status-quo

in respect of the goods under Bill of Entry No.8389492 dated 6th August, 2020."

59. From the above it is evident that this court despite exercising complete restraint could not but set aside the order-in-original in its entirety and directed the Commissioner to depute a new adjudicating officer to pass fresh order-in- original. From the observations made by this court it is quite evident that the officer who had passed the initial order-in- original had done so most mechanically and in a manner which is shocking to the judicial conscience. It was not the discrepancies in the dates which led this court to set aside the order-in-original but the manner in which the said adjudicating authority had conducted himself. It was a clear indictment of the officer.

60. If this was not enough, the new officer who was assigned the task of adjudication of the bill of entry of the petitioner by the Commissioner of Customs post the High Court order passed the fresh order-in-original dated 6th November, 2020 upholding and accepting the value of the imported goods as declared by the petitioner in the bill of entry. In the process he rejected the enhancement of the value made by the previous adjudicating authority. In paragraph 8.2 of the order dated 6th November, 2020 the new adjudicating authority clearly held that no worthwhile investigation was conducted to reject the transaction value. Value of contemporaneous import from the same overseas supplier for the same import quantity for the same period was not available. Therefore, he concluded that enhancement made to the valuation without evidence to the contrary was clearly improper. Casting suspicion on the invoice produced by the importer is not sufficient to reject it. Department has to give cogent reasons for such rejection. In the absence of any evidence price quoted in *Platt* could not be the sole basis to enhance the declared price.

Therefore, he arrived at the conclusion that the transaction value was enhanced arbitrarily without any evidence on record and held that the declared value of the imported goods as per the bill of entry merited acceptance. Consequently, he rejected the enhanced value as well as the charge of undervaluation, accepting the invoice value as furnished by the petitioner. While disposing of the matter he observed that request for waiver of demurrage was required to be addressed by the jurisdictional Commissioner of Customs and accordingly forwarded a copy of the order-in-original dated 6th November, 2020 to the said authority for doing the needful. Therefore, there cannot be any iota of doubt that the exercise of power while passing the first order-in-original was clearly arbitrary which led to an illegal order.

61. It is stated by the official respondents that immediately after the fresh order-in-original was passed on 6th November, 2020, out of charge was promptly granted on 9th November, 2020.

62. Though respondent No.3 had issued detention cum demurrage waiver certificate dated 10th November, 2020 under Regulation 6(1)(l) of the 2009 Regulations and as per public notice No.26 of 2010 dated 2nd March, 2010, subsequently, respondent No.3 issued further set of detention cum demurrage waiver certificate dated 16th November, 2020. It was clarified that the earlier detention cum demurrage waiver certificate dated 10th November, 2020 was in respect of the container freight station but it was addressed to the shipping line as well. Therefore, it was clarified that the subsequent certificate dated 16th November, 2020 was issued in terms of Regulation 10(1)(l) of the 2018 Regulations which is applicable to an authorized carrier certifying that the goods in storage under respondent No.4 are detained goods. Accordingly, respondent No.4 was directed

not to charge any detention charges for the containers laden with the detained goods and to facilitate clearance of the goods immediately.

63. Respondent Nos. 2,3 and 6 to 11 have taken the stand that they have done their part under the law and therefore, they cannot be faulted for non-release of the goods of the petitioner. According to them, customs had already given out of charge to the consignment on 9th November, 2020. Respondent No.5, the container freight station, has assured compliance. Since the shipping line was not complying with the detention cum demurrage waiver certificate dated 16th November, 2020 show cause notice dated 1st January, 2021 was issued to the shipping line i.e. respondent No. 4 to show cause as to why the registration of approval should not be revoked and as to why penalty should not be imposed.

64. On the other hand, respondent No.4 has taken the stand that petitioner had entered into a contract of carriage with its principal by way of the bill of lading. Being a shipping line provisions of the 2009 Regulations are not applicable to it as it is not a customs cargo service provider. Further, being bound by the contract petitioner is liable to pay detention and other charges levied. In so far the detention cum demurrage waiver certificate dated 16th November, 2020 is concerned, stand of respondent No.4 is that the said certificate is not in terms of Regulation 10(1)(l) of the 2018 Regulations and therefore, is not binding upon respondent No.4. Infact, respondent No.4 has taken the specific stand that being bound by the contract, it will not comply with the above certificate.

65. Having noted the rival stands as above, we may now advert to some of the relevant legal provisions.

66. Section 45 of the Customs Act under the heading “clearance of imported goods” deals with restrictions on custody and removal of imported goods. As per sub section (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 which deals with goods in transit. Sub section (2) says that 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, shall keep a record of such goods and send a copy thereof to the proper officer; 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 or in such manner as may be prescribed. Sub section (3) deals with pilferation of imported goods in a customs area with which we are not presently concerned.

67. Section 141 of the Customs Act says that conveyances and goods in a customs area are subject to control of officers of customs. As per sub section (1), all the conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of the Customs Act, be subject to the control of officers of customs. Sub section (2) says that the imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the

responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

68. Before proceeding to the provision providing the power to make regulations, it may be noted that a conjoint reading of sections 45 and 141 of the Customs Act makes it clear that officers of customs have an overall control over the goods unloaded in a customs area or which are in custody of persons approved by the Principal Commissioner or Commissioner. However, as we shall see, such general power cannot be invoked by a customs officer to issue a detention cum demurrage certificate to a customs freight station or to a shipping line.

69. Section 157 of the Customs Act provides the general power to make regulations. In exercise of powers conferred by sub section (2) of section 141 read with section 157 of the Customs Act, Central Board of Excise and Customs, now called Central Board of Indirect Taxes and Customs (already referred to as “the Board” herein-above) has made a set of regulations called the Handling of Cargo in Customs Areas Regulations, 2009 (already referred to as “the 2009 Regulations” herein-above). While Regulation 2(1)(b) defines ‘customs cargo services provider’, Regulation 6 deals with responsibilities of ‘customs cargo services provider’. Clause (l) says that subject to any other law for the time being in force, a ‘customs cargo services provider’ shall not charge any rent or demurrage on the goods seized or detained or confiscated by the prescribed customs authority. We need not labour much on the 2009 Regulations because the “customs cargo services provider” as defined under the said Regulations i.e., respondent No.5 has decided to comply with the detention cum demurrage waiver certificates dated 10th November, 2020 and 16th November, 2020 issued by respondent No.3.

70. The only obstacle now to the release of the goods of the petitioner is respondent No.4 and its principal who have taken the stand that they are not customs cargo services provider and therefore the 2009 Regulations are not applicable to them. The detention cum demurrage waiver certificate dated 16th November, 2020 is not in terms of Regulation 10(1)(l) of the 2018 Regulations and in any case it is not bound by the same.

71. This brings us to the Sea Cargo Manifest and Transhipment Regulations, 2018 (already referred to as "the 2018 Regulations" herein-above). In exercise of the powers conferred by section 157, read with sections 30, 30A, 41, 41A, 53, 54, 56, 98(3) and 158(2) of the Customs Act and in supersession of Import Manifest (Vessels) Regulations, 1971 and Export Manifest (Vessels) Regulations, 1976, the Board has made the 2018 Regulations which had come into force on and from 1st August, 2019. "Authorised carrier" has been defined in Regulation 2(1)(c) to mean an authorised sea carrier, authorised train operator or a custodian, registered under Regulation 3 and postal authority. Regulation 2(1)(d) defines the expression "authorized sea carrier" to mean the master of the vessel carrying imported goods, export goods and coastal goods or his agent or any other person notified by the Central Government. "Custodian" has been defined under Regulation 2(1)(f) to mean a person approved by the Principal Commissioner or the Commissioner of Customs, for the purposes of section 45 of the Customs Act. "Jurisdictional Commissioner of customs" has been defined under Regulation 2(1)(j) to mean the Commissioner of Customs who has granted registration under Regulation 3. Regulation 2(2) clarifies that any reference to a Commissioner of Customs shall also include a reference to Principal Commissioner of Customs for the purposes of the 2018 Regulations. Regulation 3 deals with registration of a person required to deliver arrival

manifest or departure manifest. Regulation 10 deals with responsibilities of the authorised carrier under the 2018 Regulations. Sub regulation (1) lays down as many as 13 responsibilities of an authorised carrier. Paragraphs (l) and (m) are relevant. As per paragraph (l), an authorised carrier shall not demand any container detention charges for the containers laden with the goods detained by customs for purpose of verifying the entries under section 46 or section 50 of the Customs Act, if the entries are found to be correct. As per the proviso, the authorised carrier may demand container detention charges for the period commencing after expiry of sixty days. Paragraph (m) makes it clear that an authorised carrier shall abide by all the provisions of the Customs Act and the rules, regulations, notifications and orders issued thereunder.

72. Stand of respondent No.4 is that its principal had entered into a contract with the petitioner by way of the bill of lading dated 4th June, 2020; therefore petitioner being in a contractual relationship with the principal is bound by the terms of the contract which includes payment of detention charges for use of the containers. It has also taken the stand that it is not bound by the detention cum demurrage waiver certificate dated 16th November, 2020 of respondent No.3 because of the contract and also because the said certificate is not in terms of the 2018 Regulations.

73. We will deal with this aspect a little later. Before that let us examine the decisions cited at the bar by Mr. Singh as well as by Mr. Kamat.

74. In **Shipping Corporation of India Ltd.** (*supra*), the question which fell for consideration before the Supreme Court was whether the appellant who under the terms of the contract between it and the owner of the goods having a lien over the goods

until the dues are paid could be forced to release the goods without charging any demurrage merely because the customs authorities issued a detention order for a specified period. We may note that this case was decided by the Supreme Court on 10th April, 2001. Supreme Court noted that the relationship between the importer and the carrier of the goods in whose favour the bill of lading has been consigned and who has stored the goods in his custody is governed by the contract between the parties. Reference was made to section 170 of the Indian Contract Act, 1872 which engrafts the principle of bailee's lien, namely, if somebody has received the articles on being delivered to him and is required to store the same until cleared for which he might have borne the expenses, he has a right to detain them until his dues are paid. It was held that such rights accruing in favour of the appellant could not be nullified by issuance of a certificate of detention by the customs authorities unless for issuance of such detention certificate any provisions of the Customs Act authorise. Thereafter it was noted that their Lordships were not shown any provisions of the Customs Act which would enable the customs authorities to compel the carrier not to charge demurrage charges the moment a detention certificate is issued. Referring to section 45(2)(b) of the Customs Act, Supreme Court held that the said provision cannot be construed to mean authorizing a customs officer to issue a detention certificate in respect of the imported goods which would absolve the importer from paying the demurrage charges and which would prevent the proprietor of the space from levying any demurrage charges. In the absence of any provision in the Customs Act entitling the customs officer to prohibit the owner of the space where the imported goods have been stored from levying the demurrage charges, levy of demurrage charges for non-release of the goods was held to be in accordance with the terms and conditions of the contract and was as such held to be a valid levy.

75. Supreme Court in **All India Power Engineer Federation** (*supra*), was examining amongst others waiver as a legal concept in the context of a power purchase agreement under the Electricity Act, 2003. One of the questions which arose for consideration was when public interest is involved whether waiver can at all take the place of a right in favour of the generator of electricity under a power purchase agreement if the right also has an impact on consumer interest. This judgment delivered on 8th December, 2016 was in the context of infrastructure laws i.e. Electricity Act, 2003. In that case, the power purchase agreement between the parties provided for preconditions to be satisfied for declaration of a generating unit as commercial operation date i.e. readiness to commence commercial operations. The supplier contended that the procurers had waived the requirement of 95% of contracted capacity demand under the power purchase agreement and that it was only at the behest of procurers themselves that the commercial operation date was declared on 31st March, 2013. As a result of the commercial operation date being declared on 31st March, 2013, the tariff laid down in schedule 11 of the power purchase agreement became applicable with one year being treated as one day and the second year commencing from 1st April, 2013. In the facts of that case, it has been held that a consumer of electricity would have to pay substantially more by way of tariff under the power purchase agreement if the first year is gobbled up in one day as the second year's tariff is one paisa more than the first year's tariff and the third year's tariff is substantially more than the second year's tariff. In the circumstances, it has been held that if the waiver was to be accepted, it would impact the public interest in as much as consumers of electricity would have to pay substantially more for electricity consumed by them. Therefore, waiver could not be allowed. Evidently, this decision cannot be applied to the facts of the present case. While the

petitioner is relying upon the detention cum demurrage waiver certificate dated 16th November, 2020, respondent No.4 is banking upon the terms of the contract to not give effect to such a certificate. There is no element of public interest involved in the present case.

76. A division bench of this court in **J. J. Polyplast Private Ltd.** (*supra*) decided on 30th June, 2015 took the view that relation between the importer and the shipping line is purely contractual which is by virtue of a contract between the two parties. The contract being a contract of carriage of goods, it would be outside the purview of the powers of the customs officer to give any direction or to intervene in any dispute between the shipping line and the importer. Section 141 cannot be construed to confer power upon the customs officers to intervene in a contractual dispute between importer and shipping line. This court noted that no statutory provision or any rule conferring any legal right on the importer and the same being infringed at the hands of the respondents were brought to its notice to invoke its writ jurisdiction. As noted above, the decision in this case was rendered on 30th June, 2015 much before the 2018 Regulations came into effect and therefore this court had no occasion to examine the impact of the said Regulations.

77. We may now turn our attention to the decision of the Supreme Court in the case of **Mumbai Port Trust** (*supra*), on which much emphasis has been placed by both Mr. Singh, learned Additional Solicitor General and Mr. Kamat, learned counsel for respondent No.4. In that case, the High Court of Punjab and Haryana had allowed the writ petition filed by the importer and held that detention of the goods imported by the importer by the customs at the instance of the Directorate of Revenue Intelligence

was illegal; therefore, the High Court directed that the goods imported by the importer should be released to it on payment of customs duty, further directing that Mumbai Port Trust was not entitled to charge any demurrage in view of Regulation 6(1) of the 2009 Regulations since customs had issued the detention certificate. Detention charges demanded by the shipping line were ordered to be borne by the Directorate of Revenue Intelligence and customs besides imposing cost on the customs department. This judgment was rendered on 27th July, 2017. In the above context, Supreme Court noted that Mumbai Port Trust is a statutory body constituted under the Major Port Trusts Act, 1963. Tariff authority for major ports is constituted under section 47A of the said act and imposition and recovery of rates at major ports are fixed by the tariff authority which shall notify a scale of rates under section 48. Supreme Court also considered various provisions of the Customs Act including section 160(9) which 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. Referring to previous decisions of the Supreme Court, it has been held that port trusts are public representative bodies entrusted by the legislature with authority to frame scale of rates which are approved by the Central Government. Such rates thus have the force of law. Port trusts are under a statutory obligation to render services of various kinds and are thus entitled to charge demurrage and other charges from the importer even in respect of those periods during which the importer was unable to clear the goods from the premises of the port for no fault or negligence on the part of the importer. Similar is the position in respect of International Airport Authority constituted under the International Airport Authority Act, 1971. In the circumstances, this Court held that neither the Customs Act nor the 2009 Regulations can impinge upon the statutory power of major port trusts to levy rates under

the Major Port Trusts Act, 1963. Supreme Court also noted that Regulation 6(1)(l) of the 2009 Regulations begins with the words "subject to any other law for the time being in force". Therefore, it is obvious that the 2009 Regulations are subject to any other law including the Major Port Trusts Act, 1963. It was in that context Supreme Court held that as far as detention charges are concerned, this is a private contract between the importer and the carrier i.e. the shipping line. Directorate of Revenue Intelligence or the customs authorities can be directed to pay the demurrage/detention charges only when it is proved that the action of the said authorities is absolutely *mala fide* or is in gross abuse of power. Even if an importer feels that it has been unjustly dealt with, still it must clear the goods by paying the charges due and then claim reimbursement from the customs authority. Therefore, Supreme Court held that the High Court could not have in a writ proceeding directed the Directorate of Revenue Intelligence or the customs to pay the detention charges to the shipping line since these were to be paid on the basis of a contract between the importer and the shipping line. The *raison d'etre* of the Supreme Court ruling can be found in paragraphs 29 to 32 which we quote hereunder :-

> "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."

78. The above decision of the Supreme Court in **Mumbai Port Trust** (*supra*) is clearly distinguishable and would not be attracted to the facts of the present case. In addition to the distinguishing features clearly discernible from paragraphs 29 to 32 which we have extracted above, we also find that relationship between the

petitioner and the shipping line is contractual being bound by the bill of lading dated 4th June, 2020, but in this case respondent No.3 has issued two detention cum demurrage waiver certificates dated 10th November, 2020 and 16th November, 2020, one to the container freight station i.e. respondent No.5 and the other to respondent No.4 not to demand any rent or demurrage or detention charges. In the certificate addressed to respondent No.4, it has been clarified that the goods are detained goods and hence as per Regulation 10(1)(l) of the 2018 Regulations, it was directed not to demand any detention charges and to facilitate clearance of the goods immediately. Official respondents in their reply affidavit have stated that the container freight station i.e., respondent No.5 has expressed its willingness to comply with the detention cum demurrage waiver certificate. It is only the shipping line which has raised objection contending that it is not bound to comply with the detention cum demmurage waiver certificate dated 16th November, 2020. Unlike Mumbai Port Trust, shipping line in this case is a private entity espousing its contractual right and not a statutory right. In case of Mumbai Port Trust, it has the statutory authority under section 47A of the Major Port Trusts Act, 1963 to levy various rates exercise of which power cannot be affected because of section 160(9) of the Customs Act. Even otherwise also, the 2009 Regulations being a subordinate legislation cannot in any manner affect the power and authority of the Mumbai Port Trust statutorily vested in it.

79. That apart, all the decisions relied upon by the respondents were rendered before the 2018 Regulations came into effect and therefore, the effect of the 2018 Regulations *vis-a-vis* claim of the shipping line to detention charges when Regulation 10(1)(l) thereof has been invoked by the customs authority could not be discussed or analyzed. We may also highlight the fact that

unlike Regulation 6(1)(l) of the 2009 Regulations, Regulation 10(1)(l) of the 2018 Regulations is not subject to any other law for the time being in force.

80. We have already noted that the 2018 Regulations have come into force on and from 01.08.2019. Regulation 10(l) makes it abundantly clear that an authorised carrier shall not demand any container detention charges for the containers laden with goods detained by the customs for the purpose of verifying the entries made under section 46 or section 50 of the Customs Act which deal with entry of goods on importation and entry of goods for exportation respectively if the entries are found to be correct though as per the proviso, the authorised carrier may demand container detention charges after sixty days. Regulation 10(1)(m) makes it incumbent upon an authorised carrier to abide by all the provisions of the Customs Act and the rules, regulations, notifications and orders issued thereunder.

81. The 2018 Regulations is a piece of subordinate legislation having the force of law. Since it has been framed by the Board in exercise of the powers conferred by section 157 read with sections 30, 30A, 41, 41A, 53, 54, 56, 98(3) and 158(2) of the Customs Act, certainly the 2018 Regulations have statutory force. Respondent No.3 with the approval of respondent No.2 has issued the detention cum demurrage waiver certificate dated 16.11.2020 certifying that the subject goods are detained goods and directing respondent No.4 not to demand any detention charges in respect of the containers as per Regulation 10(1)(l) of the 2018 Regulations and thus facilitate clearance of the goods immediately. Respondent No.4 has only collaterally questioned the effectiveness of such a certificate as being not bound by it. It has not stated anything in the reply affidavit regarding any independent challenge made by it

to the said certificate. Question is whether it is open to respondent No.4 or for that matter a shipping line to contend that it will not comply with the mandate of Regulation 10(1)(l) of the 2018 Regulations, more so when Regulation 10(1)(m) makes it clear that the authorised carrier shall be bound by the provisions of the Customs Act and all the rules, regulations, notifications and orders issued thereunder.

82. In the ultimate analysis, the issue boils down to a conflict between the 2018 Regulations which is a subordinate legislation having the force of law on the one hand and the contractual right of the shipping line on the other hand.

83. The question as to whether in the event of a conflict between provisions of a subordinate legislation and provisions of a contract which one would prevail is no longer *res integra*.

84. A full bench of the Allahabad High Court in **(1968) IILLJ 483 All, S. P. Srivastava Vs. Banaras Electric Light and Power** held that in the case of a conflict between the contract of service entered into between the employee and the company and the standing orders of the latter, the standing orders would prevail. It was held that the terms of the standing order would prevail over the terms of the contract which conflicts with the standing over.

85. In **Ganga Retreat and Towers Ltd. Vs. State of Rajasthan, (2003) 12 SCC 91**, Supreme Court held that every contract is subject to provisions of law. This position was reiterated by a constitution bench of the Supreme Court in **PTC India Limited Vs. Central Electricity Regulatory Commission, (2010) 4 SCC 603**, wherein it has been held that a regulation under section 178 of the Electricity Act, 2003 can intervene and even override an existing contract between regulated entities

inasmuch as it cast a statutory obligation on the regulated entities to align their existing and future contracts with the regulation.

86. Again in **State of Rajasthan Vs. J. K. Synthetics Limited, (2011) 12 SCC 518**, Supreme Court has held that the lease-deed under consideration was governed by the Mineral Concession Rules, 1960. Though the lease-deed provided that any royalty not paid within prescribed time should be paid with simple interest at the rate of 10% *per annum,* the same was subject to the Mineral Concession Rules, 1960 which upon amendment increased the rate of interest to 24% *per annum* in the event of default. In the circumstances, it has been held that any term in the lease-deed prescribing lesser rate of interest would have to yield to the Mineral Concession Rules, 1960 from the date of amendment as the rules will prevail over the terms of the lease.

87. In the light of the above, we have no hesitation to hold that objection of respondent No.4 is not legally tenable. The detention cum demurrage waiver certificate dated 16th November, 2020 has been validly issued as it can be traced to Regulation 10(1)(l) of the 2018 Regulations and under Regulation 10(1)(m) thereof, respondent No.4 i.e., the shipping line is under a legal obligation to comply with the certificate. Thus, the detention cum demurrage certificate dated 16th November, 2020 is binding on respondent No.4. That apart, holding on to the goods of the petitioner by respondent No.4 post the detention cum demurrage waiver certificate dated 16th November, 2020 and levying detention charges thereafter would be illegal and thus unlawful.

88. We may further clarify that it is nobody's case that the 2018 Regulations have not been validly made. It has therefore the full force and effect of a statute. A conjoint reading of Regulations 10(1)(l) and 10(1)(m) makes it abundantly clear that

the 2018 Regulations are fully binding on the shipping line and it is not open to the latter relying on a contractual provision to contend that it will not comply with a direction or certificate issued under Regulation 10(1)(l). The private contract between the petitioner and the shipping line must yield to the rigours imposed by the subordinate legislation *vis-a-vis* the subject matter of conflict i.e, levy of detention charges for the period under consideration. That apart, Supreme Court has held that it is an implied condition of every contract that the parties will act in conformity with the law. In case of repugnancy between provisions of a subordinate legislation and provisions of a private contract, the terms of the contract will have to yield to the provisions of the subordinate legislation to the extent of repungnancy.

89. There is one more aspect which we would like to deal with. This court while setting aside the first order-in-original vide the order dated 27th October, 2020 had directed maintenance of *status-quo* in respect of the goods of the petitioner till passing of the fresh order. It is a settled proposition that an order of the court can cause prejudice to none. Therefore, it would be wholly unjust, unfair and inequitable to levy detention or demurrage charges on the goods of the petitioner when the *status-quo* order was in operation.

90. In so far investigation by respondent No.2 into the complaint lodged by the petitioner dated 3rd November, 2020 is concerned, we feel that the said investigation should be taken to its logical conclusion. Custom officials are conferred vast powers under the Customs Act and under the rules and regulations made thereunder. Such powers are to be exercised in the interest of revenue alone. Therefore, it is essential that high officials of the customs having supervisory jurisdiction should ensure that personnel working in the

customs department strictly follow the rule book. For this purpose, internal vigilance mechanism should be strengthened and effectively used.

91. In view of what we have discussed above and the clear legal position which has unfolded, we have no hesitation to hold that the preliminary objections of respondent No.4 holds no ground.

92. Thus, on a thorough consideration of the entire matter, we are of the view that the following directions will meet the ends of justice :-

I) Respondent No.2 shall take all necessary steps and ensure that the detention cum demurrage waiver certificates dated 16.11.2020 are implemented by all concerned including respondent Nos.4 and 5 and thereafter to release the imported goods of the petitioner. Respondent No.2 shall ensure that the above exercise is completed within 15 days of receipt of a copy of this judgment and order.

II) Respondent No.2 shall continue with the investigation into the complaint of the petitioner dated 3rd November, 2020 in accordance with law and take the same to its logical conclusion within a period of three months from the date of receipt of a copy of this judgment and order. On competition of the enquiry, a copy of the enquiry report shall be furnished to the petitioner.

III) Considering the fact that customs authorities had promptly issued out of charge and the detention cum demurrage waiver certificates post the fresh order-in-original dated 6th November, 2020, we refrain from imposing cost on the customs authorities.

93. Ordered accordingly.

94. Consequently, writ petition is allowed to the extent indicated above. However, there shall be no order as to cost.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**

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