THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

AND

THE HON'BLE SHRI JUSTICE ANIL KUMAR JUKANTI

+ WRIT APPEAL No.1321 of 2012

% Date: 27.03.2024

Central Board of Excise and Customs,
Rep. by its Member Customs,
North Block, Government of India, New Delhi
and others.

... Appellants

v.

$ M/s. GMR Hyderabad International Airport Limited,
Rep. by its General Manager – Legal,
and others.

... Respondents

! Counsel for the Appellants: Mr. B.Narasimha Sarma, Learned Additional Solicitor General of India, rep. by Mr. Swaroop Oorilla, learned Senior Standing Counsel for CBIT and Customs

^ Counsel for the respondents : Mr. S.Niranjan Reddy, Learned Senior Counsel for Mr. S.Vivek Chandra Sekhar, learned counsel for respondent No.1

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➢ HEAD NOTE**:**

? CASES REFERRED:

1. 2014 (310) E.L.T. 3(Bom) : 2014 SCC OnLine Bom 1536
2. 2018 (364) E.L.T. 59(Del) : 2018 SCC OnLine Del 10816
3. (2003) 5 SCC 669
4. (2007) 6 SCC 317
5. 1960 SCC OnLine SC 118
6. (1970) 2 SCC 467
7. (1992) 3 SCC 285
8. 2023 SCC OnLine 1424
9. (2004) 3 SCC 466

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WRIT APPEAL No.1321 OF 2012

JUDGMENT: *(Per the Hon'ble the Chief Justice Alok Aradhe)*

This intra court appeal is filed against the order dated 11.06.2012 passed by the learned Single Judge by which the learned Single Judge has allowed the writ petition preferred by respondent No.1 and has *inter alia* held that Regulation 5(2) of the Handling of Cargo in Customs Areas Regulations, 2009 has no legal substratum to survive and held that consequential levy made on respondent No.1 towards cost recovery charges is wholly unsustainable. The dispute in this appeal pertains to cost recovery charges between the years 2008 and 2013. In order to appreciate the challenge of the appellants to the impugned order, the relevant facts need mention which are stated infra.

2. In the year 1999, the Government of India (GoI), Airports Authority of India (AAI) and the erstwhile

Government of Andhra Pradesh (GoAP) agreed to set up a new Greenfield International Airport at Hyderabad on Public Private Participation basis. On 26.06.2002, guidelines were issued vide Circular No.34/2002 by Central Board of Excise and Customs for appointment of Custodian of Sea Ports and Air Cargo Complexes. A tender was issued in which respondent No.1 (hereinafter referred as 'the Company') was declared as a preferred bidder and a Concession Agreement on 20.12.2004 was executed between the Ministry of Civil Aviation, GoI and the Hyderabad International Airport Limited for development, construction, operation and maintenance of Greenfield Airport at Shamshabad near Hyderabad.

3. Under the aforesaid Concession Agreement, the Company had to operate, maintain and perform airport activities and non-airport activities. Article 3.2.1(b) of the Concession Agreement recognises the right of the Company to carry on any activity or business in connection with or related to the arrival, departure and/or handling of aircraft, passengers, baggage, cargo and/or mail at the

Airport. Under Article 8.4 of the Concession Agreement, GoI was under an obligation to establish the customs immigration and quarantine procedures at its own cost.

4. On 07.12.2006, the Company submitted an application for appointment as Custodian under Section 45 of the Customs Act, 1962. Thereafter, on 16.05.2007, the Company submitted a representation to Central Board of Excise and Customs requesting the GoI to waive condition Nos.10 to 13 of Circular No.34/2002 dated 26.06.2002 and to issue necessary instructions to the GoI to grant Custodianship without imposing any onerous conditions. Again a reminder was submitted on 22.11.2007 to GoI.

5. The Commissioner of Customs and Central Excise, Hyderabad vide Notification No.2/2008, dated 11.03.2008 granted Custodianship to the Company which provided for payment of cost of customs department by the Company. The Assistant Commissioner of Customs, Air Cargo Complex, Hyderabad by a communication dated 01.03.2008 requested the Company to bear the cost of Customs Staff posted at Air Cargo Complex from the date

of operation at the Airport premises. Thereafter, again a reminder was issued on 15.03.2008. The Additional Commissioner, Customs, thereafter on 09.04.2008 again directed the Company to deposit cost recovery charges for three months for the staff posted at Air Cargo Complex.

6. The Company thereupon filed W.P.No.13188 of 2008 in which the action of the appellants in seeking to recover customs cost recovery was challenged. The learned Single Judge of this Court by an interim order dated 21.11.2008 stayed all further proceedings in pursuance of the letter dated 09.04.2008. Thereafter, a Notification No.26/2009, dated 17.03.2009 was issued by Central Board of Excise and Customs by which in exercise of powers under Section 141(2) and Section 157 of the Customs Act, 1962, the Regulations, namely the Handling of Cargo in Customs Areas Regulations, 2009 (hereinafter referred to as 'the 2009 Regulations') were framed with retrospective effect i.e., from 17.03.2009.

7. The Company thereafter on 23.03.2009 withdrew the writ petition, namely W.P.No.13188 of 2008 in view of

issuance of aforesaid Notification No.26/2009. Thereafter, a Circular No.13/2009, dated 23.03.2009 was issued, by which the Company was asked to pay cost of providing the custom clearance certificate of customs department. By an order dated 16.06.2009 the Assistant Commissioner Customs raised a demand of Rs.2,72,54,865/- for the period from 23.03.2008 to 31.03.2009 towards establishment charges of the Customs Staff posted at Air Cargo Complex. On 25.06.2009, the Company paid a sum of Rs.1.50 crores under protest. Again on 07.08.2009, a further sum of Rs.1.00 crore was paid under protest. The Company filed the writ petition, in which the validity of the Notification No.26/2009, dated 17.03.2009 and Notification No.96/2010, dated 22.11.2010 issued by the Central Board of Excise and Customs in respect of cost recovery was challenged.

8. The learned Single Judge of this Court by an order dated 11.06.2012 allowed the writ petition and *inter alia* held that Regulation 5(2) of the 2009 Regulations has no legal substratum to survive and held that consequential

levy made on respondent No.1 towards cost recovery charges is wholly unsustainable. In the aforesaid factual background, this intra court appeal has been filed.

9. Learned Additional Solicitor General of India submitted that the Company, at the time of submission of application seeking appointment as Custodian, had furnished an undertaking that it shall abide by the 2009 Regulations and therefore, the undertaking binds the Company. It is further submitted that learned Single Judge ought to have appreciated that 2009 Regulations have been framed in exercise of powers under Section 141 read with Section 157 of the Customs Act, 1962. It is pointed out that the validity of the 2009 Regulations has been upheld by a Division Bench of Bombay High Court in **Mumbai International Airport Private Limited vs. Union of India**[1] and also by a Division Bench of Delhi High Court in **Allied ICD Services Limited vs. Union of India**[2]. It is therefore submitted that the impugned order passed by the

[1] 2014 (310) E.L.T. 3(Bom) : 2014 SCC OnLine Bom 1536
[2] 2018 (364) E.L.T. 59(Del) : 2018 SCC OnLine Del 10816

learned Single Judge be set aside and the appeal be allowed.

10. On the other hand, learned Senior Counsel for the Company submitted that neither Section 141 nor Section 157 of the Customs Act, 1962 contemplates framing Regulations with regard to cost recovery charges. Therefore, the impugned 2009 Regulations are *ultra vires* the Customs Act, 1962. It is pointed out that after submitting the application seeking appointment of Custodian under Section 45(1) of the Customs Act, 1962, the Company had submitted applications on 16.05.2007 and 22.11.2007 seeking to waive condition Nos.10 to 13 of Circular No.34/2002, dated 26.06.2002. Therefore, the plea of estoppel does not apply in the facts and circumstances of the case. It is further submitted that the Officers of the Customs Department perform the statutory duties and therefore, there is no justification for levy of cost recovery charges. It is contended that under Concession Agreement, the Company is not liable to pay any cost

recovery charges for the salaries of the staff of the Customs Department posted at the Air Cargo Complex.

11. Alternatively, it is submitted that even if the same are treated to be a fee, there is no justification for levy of fees as no service is being rendered to the Company. In the absence of any element of *quid pro quo*, it is urged that the decisions of Bombay and Delhi High Courts in **Mumbai International Airport Private Limited** (supra) and **Allied ICD Services Limited** (supra) are distinguishable and the learned Single Judge of this Court has rightly held that the 2009 Regulations are *ultra vires* the Customs Act, 1962. In support of the aforesaid submissions, reliance has been placed on the decisions of the Supreme Court in **Government of Maharashtra vs. Deokar's Distillery**[3] and **Gupta Modern Breweries vs. State of Jammu and Kashmir**[4].

12. We have considered the submissions made on rival sides and have perused the record. The singular issue

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[3] (2003) 5 SCC 669
[4] (2007) 6 SCC 317

which arises for consideration in this *intra* Court Appeal is whether the impugned 2009 Regulations are *ultra vires* the Customs Act, 1962.

13. The principles of interpretation with regard to taxing statutes are well-settled. A Constitution Bench of the Supreme Court in **CST vs. Modi Sugar Mills Limited**[5] held that the construction has to be made on express language used in the statute and there is no room for equitable consideration and presumption cannot apply.

14. A three-Judge Bench of the Supreme Court in **Bimal Chandra Banerjee vs. State of Madhya Pradesh**[6] held that the State Government cannot impose tax when there is no special authorization to do the same by the taxing statute. In paragraphs 13 and 14, it was held as under:

> "13. Neither Section 25 nor Section 26 nor Section 27 nor Section 62(1) or clauses (*d*) and (*h*) of Section 62(2) empower the rule-making authority viz. the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under Section 13 or

[5] 1960 SCC OnLine SC 118
[6] (1970) 2 SCC 467

> manufactured in any distillery established or any distillery or brewery licensed under the Act. The Legislature has levied excise duty only on those articles which come within the scope of Section 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25. Therefore it is not necessary to consider whether any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess.
>
> 14. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it."

15. Another three-Judge Bench of the Supreme Court in **Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla**[7] held that no tax can be imposed by any rules or regulations unless the statute under which such subordinate legislation is made

[7] (1992) 3 SCC 285

specifically authorized imposition of such tax. In the Regulations framed under the statute, levy of any tax or fee must be based on a specific statutory provision and not on any implied, incidental or ancillary authority. In paragraph 7, it has been held as under:

> "7. After giving our anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power. The facts and circumstances in the case of District Council of Jowai are entirely different. The exercise of powers by the Autonomous Jaintia Hills Districts are controlled by the constitutional provisions and in the special facts of the case, this Court has indicated that the realisation of just fee for a specific purpose by the autonomous District was justified and such power was implied. The said decision cannot be made applicable in the facts of this case or the same should not be held to have laid down any legal proposition that in matters of

> imposition of tax or fees, the question of necessary intendment may be looked into when there is no express provision for imposition of fee or tax. The other decision in *Khargram Panchayat Samiti case* [(1987) 3 SCC 82] also deals with the exercise of incidental and consequential power in the field of administrative law and the same does not deal with the power of imposing tax and fee."

16. The principles with regard to construction of taxing statute were summarized recently by a three-Judge Bench of the Supreme Court recently in **Modi Naturals Limited vs. Commissioner of Commercial Tax, Uttar Pradesh**[8] and in paragraph 43, it was held as under:

> "43. The passages extracted above, were quoted with approval by this court in at least two decisions being CIT v. Kasturi and Sons Limited ((1999) 237 ITR 24 (SC) : (1999) 3 SCC 346) and State of West Bengal v. Kesoram Industries Limited ((2004) 266 ITR 721 (SC) : (2004) 10 SCC 201) (hereinafter referred to as "Kesoram Industries case", for brevity). In the later decision, a Bench of five Judges, after citing the above passage from Justice G. P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute (pg.782):
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> > "(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be

[8] 2023 SCC OnLine SC 1424

> interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency; (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the Legislature's failure to express itself clearly."

17. On the touchstone of the aforesaid well settled legal principles, we may now take note of the relevant statutory provisions of the Customs Act, 1962. The Act has been enacted with the object to sternly and expeditiously deal with smuggled goods and curb the debts on the revenue thus caused. The Act *inter alia* provides for confiscation of goods and conveyance and imposition of penalties when any goods which are imported contrary to any prohibition imposed by or under the Act or any other law for the time

being in force. Chapter-XVII of the Customs Act, 1962 deals with Miscellaneous. Chapter-XVII of the Act contains Section 141 and Section 157. Section 141 of the Act deals with 'conveyances and goods in a customs area subject to control of officers of customs'. Section 141 is extracted below for the facility of the reference.

> "**141. Conveyances and goods in a customs area subject to control of officers of customs:-** (1) All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.
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> (2) The imported or export goods may be received, stored, delivered, despatched 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."

18. It is evident that all the conveyances and goods in a customs area shall, for the purposes of enforcing the provisions of the Customs Act shall be subject to control of the officers of customs. Section 141 (2) of the Customs Act provides that the imported or export goods may be received, stored, delivered, despatched 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.

19. Section 157 of the Customs Act deals with General power to frame regulations. Section 157 of the Act, which is relevant for the purpose of controversy involved in this appeal, reads as under:

> "**157. General power to make regulations:-**
> (1) Without prejudice to any power to make regulations contained elsewhere in this Act, the Board may make regulations consistent with this Act and the rules, generally to carry out the purposes of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:--
>
> (a) the form and manner to deliver or present of a bill of entry, shipping bill, bill of export, arrival manifest or import manifest, import report, departure manifest or export manifest, export report, bill of transhipment, declaration for transhipment boat note and bill of coastal goods;
>
> (ai) the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the

proper officer under clause *(d)* of sub-section *(1)* of section 26A;

(aii) the form and manner of making application for refund of duty under sub-section *(2)* of section 26A;

(aa) the form and manner in which an application for refund shall be made under section 27;

(ab) the form, the particulars, the manner and the time of delivering the passenger and crew manifest for arrival and departure and passenger name record information and the penalty for delay in delivering such information under sections 30A and 41A;

(b) the conditions subject to which the transhipment of all or any goods under sub-section *(3)* of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;

(c) the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65.

(d) the time and manner of finalisation of provisional assessment;

(e) the manner of conducting pre-notice consultation;

(f) the circumstances under which, and the manner in which, supplementary notice may be issued;

(g) the form and manner in which an application for advance ruling or appeal shall be made, and the procedure for the Authority, under Chapter VB;

(h) the manner of clearance or removal of imported or export goods;

(i) the documents to be furnished in relation to imported goods;

(j) the conditions, restrictions and the manner of making deposits in electronic cash ledger, the utilisation and refund therefrom and the manner of maintaining such ledger;

(ja) the manner of maintaining electronic duty credit ledger, making payment from such ledger, transfer of duty credit from ledger of one person to the ledger of another and the conditions, restrictions and time limit relating thereto;

(k) the manner of conducting audit;

(ka) the manner of authentication and the time limit for such authentication, the document or information to be furnished and the manner of submitting such document or information and the time limit for such submission, the form and the manner of furnishing alternative means of identification and the time limit for furnishing such identification, person or class of persons to be

exempted and conditions subject to which suspension may be made, under Chapter XIIB;

(l) the goods for controlled delivery and the manner thereof;

(m) the measures and separate procedure or documentation for a class of importers or exporters or categories of goods or on the basis of the modes of transport of goods.

(n) the form and manner, the time limit and the restrictions and conditions for amendment of any document under section 149."

20. Thus, from a perusal of Section 157 of the Customs Act, it is evident that Section 157 does not enumerate any specific provision under which cost recovery charges i.e., the amount of salary payable to the officials of the Customs Department, who are deployed at the Airport who perform their statutory duties, can be recovered. The 2009 Regulations have been framed in exercise of the powers conferred under Section 141 and Section 157 of the Customs Act. From a close scrutiny of the aforesaid provisions of Sections 141 and 157, it is evident that there is no express statutory provision conferring authority on the appellants to levy cost recovery charges. In the absence

of any special authorization to levy cost recovery charges, appellants have no authority to impose cost recovery charges by means of a Regulation. The inevitable conclusion is that the 2009 Regulations are *ultra vires* the Customs Act, 1962.

21. Now we may advert to the nature of levy. In **Gupta Modern Breweries** (supra), after taking note of the decision in **CCE v. Chhata Sugar Company Limited**[9], it was held as under:

> "27. In *CCE* v. *Chhata Sugar Co. Ltd.*, [(2004) 3 SCC 466], one of the issues was whether the State Government's administrative charges to collect a levy could be passed on to the person from whom the tax, fee or levy was collected. This Court categorically held that such an imposition would be a tax and not a fee and must be duly authorised since it is a tax (at para 14), it is held: (SCC p. 483)
>
> > "Hence, administrative charge under the U.P. Act is a tax and not a fee."
>
> 28. It is, thus, clear from the aforesaid decisions that imposition of administrative services (*sic* charges) is a tax and not a fee. Such imposition without backing of statutes is unreasonable and unfair."

[9] (2004) 3 SCC 466

22. Therefore, the officers of the Customs Department, who were employed at the Airport between the years 2008 and 2013, were deployed to perform their statutory duties. The levy of cost recovery charges, which is in fact salaries payable to the customs staff deployed at the Airport is in the nature of administrative charges and is a tax. It cannot be exacted from the respondent without any statutory provision. Therefore, the same is also violative of Article 265 of the Constitution of India. Even assuming that the said levy to be a fee, the same cannot be recovered from the respondent as no services are provided to it by deployment of additional staff at the Airport between the years 2008 and 2013.

23. We may take note of decision of Bombay High Court in **Mumbai International Airport Private Limited** (supra). In the aforesaid decision, the validity of Regulation 5(2) of the 2009 Regulations was challenged on the ground that the same is *ultra vires* Sections 157 and 158 of the Customs Act as well as violative of Articles 14 and 19(1)(g) of the Constitution of India. The aforesaid ground of

challenge was dealt by the Division Bench in paragraph 53, which reads as under:

> "**53.** Mr. Jetly was, therefore, justified in urging that the Petitioners communication firstly requesting for grant of a status as a custodian and thereafter seeking approval would bely their contentions and to the contrary. If some governmental functions have been now allowed to be performed and carried out by the private entities that will not make any difference. In that regard, Mr. Jetly's reliance on para-10 of the affidavit in reply and the annexures thereto, is well placed. Mr. Jetly also is justified in relying on section 141(2) and the language of section 157 of the Customs Act to support the validity and legality of the Regulations. By Act 18 of 2008, section 141 has been renumbered as sub section(1) and sub section (2). By sub section (1) what has been clarified is that all conveyances and goods in a customs area are subject to control of officers of customs. They are incharge of enforcing the provisions of this Act and duty bound to do so. It is in that regard and to enable them to enforce the provisions of the Customs Act properly and effectively that by sub section (2) the receipt, storage, delivery, dispatch or otherwise handling of the imported and exported goods in a customs area has to be regulated and controlled. Therefore, it is open to the authorities to make prescription by way of rules or regulations so that responsibilities of person engaged in all the above activities are fixed. Therefore, these regulations are traceable and safely to this legal provision."

Thus, it is evident that the Division Bench of Bombay High Court did not examine the ground of challenge whether in the absence of any specific provision to levy cost recovery charges, whether the same could be imposed under the Regulations. Similarly, the Division Bench of Delhi High Court in **Allied ICD Services Limited** (supra) has relied on the decision of the Bombay High Court. Therefore, the aforesaid decisions rendered by Bombay High Court as well as Delhi High Court are distinguishable.

24. So far as the contention that the Company at the time of application seeking appointment as Custodian has furnished an undertaking that it shall abide by the 2009 Regulations is concerned, suffice it to say that the Company subsequently on 06.05.2007 and 22.11.2007 had submitted applications seeking to waive the condition Nos.10 to 13 of Circular No.34/2002 dated 26.06.2002. Therefore, the undertaking furnished by the Company does not bind it in the facts of the case.

25. For the aforementioned reasons, we agree with the conclusion of the learned Single Judge that the impugned 2009 Regulations are *ultra vires* the Customs Act.

26. In the result, the Appeal fails and the same is hereby dismissed. No order as to costs.

Miscellaneous applications, pending if any, shall stand closed.

ALOK ARADHE, CJ

ANIL KUMAR JUKANTI

27.03.2024

Note: LR copy be marked.
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