IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Diamond Shipping Services (Pvt.) Ltd.
P. O. Box 1125, Robert Senanayake
Building No. 46/5, Nawam Mawatha,
Colombo 2.

PETITIONER

C.A. No. 127/2009 (Writ)

Vs.

1. Sri Lanka Ports Authority
   No. 19, Church Street,
   Colombo 1.

2. Shirani Wanniarachchci
   Director (Finance)
   Sri Lanka Ports Authority
   No. 19, Church Street,
   Colombo 1.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: Shibly Aziz P.C. with Dushantha de Silva for the Petitioner

Arjuna Obeysekera D.S.G. for Respondents

ARGUED ON: 18.09.2013 & 12.03.2014

DECIDED ON: 07.11.2014

GOONERATNE J.

The Petitioner Company has sought mandates in the nature of Writs of Certiorari and Prohibition. Writs of Certiorari are sought to quash the decisions marked P7, P10 & P13 of the 2nd Respondent, Director- Finance, Sri Lanka Ports Authority. By sub-para (b) & (c) of the prayer to the petition certiorari also sought as stated therein to quash the decisions to recover the penalties imposed by documents referred to in the said para (b) and penalties imposed on late payments on account of port dues/fees and other charges, paid by the Petitioner Company. Writ of Prohibition sought as in sub-paras (g), (h) & (i) from recovering sums of money referred to therein, and to prevent

the 1st Respondent from denying all such port services enjoyed by the Petitioner Company. The main business of the Petitioner was to provide services as a ship's agent to several ship operators calling at the port of Colombo. Petitioner also claims to be a member of the Ceylon Association of ship's agents. In the petition filed of record by the Petitioner Company attention of this court is drawn to certain statutory provisions relating to port services, levy and port charges and the mechanisms for recovery procedures in terms of Sections 6, 7 and part V of Act No. 51 of 1979.

It is also averred in the Petitioner's petition that general guide lines (P2) issued by the 1st Respondent require the ship's agents to pay 100% port charges in advance. Notwithstanding the above guidelines the 1st Respondent had provided the required port services to its principles vessels from time to time without first charging with such advance payments. Petitioner pleads that notwithstanding the above guidelines (P2) the Petitioner Company has settled all port charges. One of the complaints of the Petitioner Company as pleaded is that notwithstanding above the 1st Respondent had on or about February 2008 wrongfully suspended the services provided to the Petitioner for non-settlement of the outstanding sum of Rs. 15,417,267/00 which included bills

raised as penalties. It is also averred that for the reasons stated in para 13 of the Petition the Petitioner settled the bills, and the break-down of the above sum of Rs. 15,417,267/- which gives some details of the penalties, are contained in para 14 of the petition. It also pleaded that on or about May 2008 the 1st Respondent once again imposed penalties for delayed payments. The penalties as contained in para 16 of the petition is in a sum of Rs. 10,543,492/- as at 31.12.2008. The learned President's Counsel for Petitioner vehemently argued that there is no provisions to recover penalties in terms of the Sri Lanka Ports Authority Act. Another matter stressed in the pleadings are that as per document 'P5' penalties purported to have been imposed between 6 months to 20 months after arrival of the relevant vessels, although all invoices should be submitted within 120 days (para 19 of petition). By letter P6 of 24.6.2008 Petitioner Company states that the 1st Respondent was informed that relevant stevedoring bills were settled and in order to maintain cordial relationship with the 1st Respondent sought an amicable resolution. In spite of P6, the 2nd Respondent by letter P7 of 12.9.2008 insisted that the penalties be fully settled. In P7 reference is made to, 2008 tariff guide (pg. 29) which impose 15% penalty for non-payment of stevedoring. Petitioner had replied letter P7 by letter P8 and explained the legal position through an Attorney-at-Law.

The learned President's Counsel maintained the argument that there is no statutory provision under Act No. 51 of 1979 to suspend 'port services' as per Section 6 of the above Act, and he also submitted that the decision to recover and impose penalties from the Petitioner is ultra vires the Act No. 51 of 1979. Material placed before court gives a vivid description of the attempts by the Respondent to recover dues and the demands made to limit credit facilities if penalties are not paid and to get the Petitioner Company deposit sums of money – vide paras 30, 31, 33 & 34 of the petition.

I would also endeavour to gather the position of the Respondent initially from the objections filed of record on behalf of the Respondents. It is admitted by the Respondent that the Petitioner Company provides services as a ship's agent and state that the Petitioner is responsible only for 3% of the total transshipment volume of the Ports Authority. Respondent denies that at present a ship's agent is required to pay 100% port charges in advance, prior to commencement of cargo handling or stevedoring (vide R1A & R1B). Ship's agents should pay stevedoring charges within 13 days after departure of ship (3 working day concessionary period). In support of same, Respondent produce the port tariffs for the year 2007/2008 RIA & RIB. As a matter of law

Respondent pleads that Petitioner has misrepresented and suppressed this material fact. Respondent states if the Petitioner Company fails to make payment within three days as aforesaid the Petitioner was charged 15% of the unpaid amount, and such charges are approved under Section 37(1) of the statute.

The reason to suspend the services according to the Respondent is that the Petitioner had an outstanding debt of Rs. 15 million for services provided to the Petitioner, which includes services for stevedoring and non-payment of stevedoring charges on time. Petitioner had unpaid bills over and above the credit limit, which the Petitioner failed to settle within the credit period. Contract services in these circumstances would have been financially imprudent to the Ports Authority.

The entirety of the objections of the Respondents suggest that the Petitioner Company was at a certain time and period defaulted the payments claimed by the Respondents for the services provided to the Petitioner Company. As a matter of law Respondents plead that the Petitioner has maliciously misrepresented material facts and plead that this court should not use its discretionary powers in favour of the Petitioner Company. I would for

purpose of clarity and for better understanding of the issue as presented by the Respondent refer to the following from the objections, filed of record.

As regards P6 whilst admitting receipt of same Respondents state:

(i) In the said document the Petitioner does not state that no outstanding payments remain to be paid to the 1st Respondent;

(ii) On the contrary the Petitioner seeks a waiver of the sums charged as penalty and thereby admits and acknowledges the right, power and authority of the 1st Respondent to make such a charge where the Petitioner fails to make payments for stevedoring services within the 03 working day period.

(iii) The Petitioner contributes only 3% of the transshipment volumes at the Port of Colombo.

(iv) The 1st Respondent is empowered to impose charges which operate as negative incentive to ship agents to make full payments for stevedoring services prior to the expiry of the concessionary period of 03 working hours;

(v) The decision to suspend the provision of services is not in lieu of port charges due on services rendered by the 1st Respondent as alleged by the Petitioner but based on the failure and inability of any particular ship agent to pay the charges for services provided exhausting the credit limit and the credit period granted;

(vi) It would be an absurdity to construe the provisions of Sri Lanka Ports Authority Act as requiring the 1st Respondent to continue to provide services when the ship agent is in default of payments for services rendered.

(vii) On the contrary the said Act requires the 1st Respondent to conduct its business in a manner that would secure its revenue and the 1st Respondent is empowered to do all acts necessary for the carrying on of its business.

(viii) All ship agents are granted credit as the 1st Respondent is empowered to do all acts which are necessary for the carrying on of the business of the 1st Respondent

(ix) The credit facility is granted on the basis of a contractual agreement with the Petitioner and the Petitioner had exhausted the credit facility so granted;
(in proof whereof the Respondents annex hereto marked R2, true copy of the contract establishing the Steamer Agents Credit Account for the Petitioner with the Sri Lanka Ports Authority and plead the same as being part and parcel of this petition).

Receipt of P12 admitted and Petitioner agreed to pay charges on delayed payment of stevedoring

(i) Despite indicating an 'agreement' to pay the Petitioner has not and did not pay the same despite being requested to do so by the 1st Respondent

(ii) Therefore the letter marked P12 was an attempt on the Petitioner to mislead the 1st Respondent

(iii) Further the failure of the Petitioner to pay the said charges despite recording agreement to paying the same, demonstrates the Petitioner's lack of good faith;

Therefore the Respondent plead that the Petitioner has not come with clean hands and therefore is not entitled to any discretionary relief.

It is also pleaded that:

(i) The Petitioner has sought to maliciously misrepresent facts by imputing collateral purposes for the imposition on the 15% charge for the non payment for stevedoring services within the 03 working day concessionary period and has maliciously sought to cast aspersions on the objective for which such a charge is being levied;

(ii) Furthermore the relief sought for by the Petitioner are based on contractual agreements with the 1st Respondent and therefore are not amendable to judicial review.

(iii) The Petitioner has suppressed the afore stated contractual documents and has tin several instances suppressed and misrepresented material facts;

(iv) The conduct of the Petitioner does not befit the grant of any discretionary relief.

(v) The application of the Petitioner is misconceived in law;

The 1st Respondent, The Sri Lanka Ports Authority as per the Statute (Act No. 51 of 1979) is under a duty to provide port services to ships or vessels. Agent is not the owner or the operator but the Petitioner Company is a ship's agent to several ship operators calling at the Port of Colombo. Learned President's Counsel argued that the stevedoring services offered by the 1st Respondent was provided to the Petitioner's principal's vessels. As such the vessels are liable to pay the stevedoring charges, to the 1st Respondent, and the Petitioner Company as the ship's agent merely collects such charges from the Agent's principals the owner/operator and settle the 1st Respondent. This seems to be the position. Even tariff guide 2007/2008 (R1A & R1B) at pgs. 1- 3, 6 -13 indicates that charges are payable by ship/cargo operator.

It is also not incorrect to observe and as contended by learned Deputy Solicitor General , that in practice a vessel carrying the flag of another country, the 1st Respondent would have no control over such vessel which would call over at the port, drop off the cargo consigned to Colombo and

collect outward cargo and leave the port. All necessary services would be provided by the 1st Respondent and the agent need to play a substantial role in the process, since the ships have other business in other ports outside Sri Lanka. Whatever said, material placed by the Petitioner Company itself indicate that the Petitioner Company had settled port charges of various items inclusive of stevedoring for a period of time. Problem seems to have surfaced when the 1st Respondent imposed penalties and charges on a percentage basis, when the amounts due were not settled as required by regulations or tariff guide. Having acquised in the process of settling dues, would it be possible in law to declare that imposing penalties would be illegal on the Petitioner Company, who is the ship's agent, with a duly obtained licence? Agency should be antecedently given or subsequently adopted to subject the principal to the act of the agent. 31 NLR 467; 7 Times 155. The authority of the Agent has also not been revoked, as far as the case in hand is concerned, and no such views were expressed by either party, When an agent is employed to conduct a particular trade or business he has implied authority to do whatever is incidental to such trade or business and the agent can be called a General Agent. If the agent is employed only to make a particular contract he is a

special agent. Whatever it may be the Petitioner being a ship's agent had been involved in settling dues, to the 1st Respondent Authority. Irrespective of all above an important question is whether the Authority could impose a penalty in the manner described by the Petitioner Company? On the other hand could it be said that loading and unloading of ships is a service provided to the vessel and not to its agent and get over the problem of payment? Is this the stage to bring about such an argument, having got involved in the payment process?

The definition to 'charges' as in Section 89 of the Act reads thus:

"charges" include charges, rates fees and dues of every description which the Ports Authority is, for the time being authorized to demand , take and recover and "charge" shall be construed accordingly;

It seems to be fairly wide in its application and which describes charges to include dues of every description.

Our attention has been drawn to the tariff documents and the following section of the Sri Lanka Ports Authority Act. I have already referred to the tariff documents. Section 40(1) of the Act refer to power to distrain or arrest for non-payment of charges where master, owner or agent of the vessel fails to pay to the 1st Respondent on demand of any charge. Section 40(2)

enable the vessel to be sold to recover charges, arrears, rents, dues and penalties etc. As such I agree that under Section 40(2) of the Act the liability is on the vessel of the ship owner and not the property of any other, like the agent. There is also reference to Section 42A of the Act as Amended. The procedure for recovery is clearly contemplated under Section 42A. e.g. Posting of a certificate, and invoking the jurisdiction of the District Court and the issue of a writ of execution. Though the Petitioner state that the agent cannot be held responsible for payments due, we are unable to hold with that view and observe that such recovery could be pursued as provided by the statute, but the percentage levied as penalty is not contemplated under Section 7(1)(h) and 37(1) of the Act, but there cannot be a prohibition to levy a penalty. The basis of imposing 15% of unpaid sums in a way is disproportionate and not provided by statute. Even if subordinate regulations provide for such a percentage it is disproportionate. The 1st Respondent should have resorted to the provisions contained in Section 57(1) which includes imposition of penalty, subject to the institution of action under Section 57 in the Magistrate's Court. (Penalty under this section would be under different circumstances).

Imposing a penalty does not seem to be prohibited by the statute, but what the Respondents have done seems to be unreasonable and disproportionate. In this regard this court has been informed as stated in the written submissions that invoices P4(1) to P4(225) were sent by the 1st Respondent 6 to 20 months after the departure of the vessels (P5). Some invoices sent 3 months after departure and others 6 – 20 months after departure. This seems to be highly unreasonable if the position is correct. I think it is desirable to provide such details in this judgment as submitted on behalf of the Petitioner Company, as follows.

(a) Vide: invoice marked P4 (9) – The vessels therein SOON FU arrived at the Port of Colombo on 15/7/2007. There was a sum of Rs.664,157/- outstanding as stevedoring charges and which was since settled on 20.7.2007 (vide item 9 in the document P8(a) in the Petition) and is not disputed by the Respondents. However on 23.10.2008 (i.e 15 months after the vessel's departure) the 1st Respondent sent the purported penalty invoice marked P4(9) in a sum of Rs. 99,624/- notwithstanding the fact that the relevant outstanding stevedoring charge was settled within a week of the vessels arrival date.

(b) Vide: invoice marked P4 (190) – The vessel therein MV SKY VENUS arrived at the Port of Colombo on 3/5/2008. There was a sum of Rs. 1,519,442/- outstanding as stevedoring charges and which was since settled on 8.5.2008 (vide: item 190 in the document P8(a) in the Petition) and is not disputed by the Respondents. However on 31.12.2008 (i.e 6 ½ months after the vessel arrival) the 1st Respondent sent the purported penalty invoice marked P4 (190) in a sum of Rs. 227,916/- notwithstanding the fact that the relevant outstanding stevedoring charge was settled within a week of the vessel arrival date.

(c) Vide: invoice marked P4 (224) – The vessel therein TS LAMCHEABANG arrived at the Port of Colombo on 16/7/2008. There was a sum of Rs. 2,423,370/- outstanding as stevedoring charges and which was since settled on 23.7.2008 (vide: item 224 in the document P8(a) in the Petition) and is not disputed by the Respondents. However on 31.12.2008 (i.e. 5 ½ months after the vessel arrival) the 1st Respondent sent the purported penalty invoice marked P4(224) in sum of Rs. 363.506/- notwithstanding the fact that the relevant outstanding stevedoring charge was settled within a week of the vessel arrival date.

Over the years the principle of proportionality has been developed in various jurisdictions and today our courts have endorsed such a principle in case law. I would fortify my views from the following case law which demonstrates its general acceptance as a principle of law.

Justice U. De Z. Gunawardana, in Premaratne v. University Grants Commission and Others, (1998) 3 Sri L.R 395 states at page 416 that, 'consequences of deprivation ought to be considered for a penalty to be proportionate, and a penalty which is disproportionately draconian must be quashed as being an excessively severe penalty. The doctrine of proportionality which works on the assumption that any action or punishment ought not to go beyond the scope necessary to achieve its desired result has found a place in case law, for instance, in R. v. Barnsley ex parte Hook, which illustrates that if any action or measure is considered to do more harm than good in reaching a given objective it is liable to be set aside, for the court has to consider whether the ends justify the means.'

The same learned Judge, in Wickremasinghe v. Chandrananda De Silva, Secretary Ministry of Defence and Others (2001) 2 Sr. L.R 333 has held that the Doctrine of proportionality provides that a Court of review may intervene if it considers that harms attendant upon a particular exercise of power are disproportionate to the benefits sought to be achieved.

The above dictum was thereafter followed in Neidra Fernando v. Ceylon Tourist Board and Others (2002) 2 Sri L.R 169.

Sriskandararajah J. in Caldera v. University of Peradeniya and Others. C.A Writ No. 572/2004, CA Minutes of 25//04/05, has also relied upon the principles of proportionality in striking down the suspension of a university student.

This court observes that unlike any other country charges payable for providing services such as stevedoring etc. are statutorily due. Petitioner Company is a ship's agent with a license in terms of Act No. 10 of 1972. The Shipping Agent is defined as:

Shipping Agent "means any individual, firm or company engaged in the husbanding of ships and provision of services to shipping in Sri Lanka on behalf of owners, principals, charterers and masters, and includes:

(a) Arrangement for provision of 'port services' through the Sri Lanka Ports Authority, Customs and other Government or semi-Government Institutions, firms or private individuals;
(d) Arrangements connected with cargo loading and unloading, cargo documentation, cargo procurement and disposal, and financial and other or allied matters connected with all the above-mentioned services to shipping

My attention has also been drawn to the following sections of the Ports Authority Act.

Section 80 reads thus:

"The master or owner of every importing vessel or his agent shall sign and leave at the office of the Ports Authority within twenty four hours after the arrival of such vessel in the Port with imported goods, a full and accurate list of the said goods, containing all particulars as to:

(a) The gross weight, measurements, marks, numbers and contents of each package; and
(b) The names of the consignees according to the bills of lading or the names of the persons actually paying the freight for such goods".

Section 89 reads thus:
"owner when used in relation to any vessel, includes any part-owner, charterer or operator thereof or any duly authorized agent of any such person"

Therefore the vicarious liability of agent is well recognized having regard to all the statutory provisions referred to above. Section 37(1) provides to obtain necessary approval from the Ministers concerned and charges need to be fixed. However this court is only inclined to rule on its proportionality.

A variety of objections and duties are bestowed on the Ports Authority in terms of Section 6 of the principle enactment, inclusive of providing certain identified port services relevant to this case. The case in hand refer and relate to certain important services provided to the principal of the

Petitioner Company, Petitioner being the duly authorized agent. Petitioner Company's authority to act no doubt constitutes a power to effect the principal's legal relations, with third parties. Petitioner's relationship with its principal is commercially related. This court is not inclined to treat the tariff guide as invalid. Charges could be levied as set out in the tariff guide. This include 'basic' and 'penal' charges. In a way the 1st Respondent Authority enters into a contract with all those who wish to obtain the services of the 1st Respondent Authority. This being a discretionary remedy of court I do not wish to reject this application on that ground. Discretion could be used either way and in a reasonable manner.

I have already given my mind to the principle of proportionality. The material placed before court only indicates that invoices marked and produced P4(9), P4(190) and P4(224) had been sent after a fairly long lapse of time. This is no doubt unreasonable, and amounts claimed as penalty on same, disproportionate. We are not inclined to grant any other relief claimed in the several sub-paras of the prayer to the petition other than sub-para (c) with a limited application to the above mentioned three invoices, only. Therefore this application is allowed only as per sub-para 'C' of the prayer to the petition and

limited in its application only to the three invoices referred to above. Application allowed as above without costs.

Application partly allowed limited to prayer 'C' as above.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL