

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Rai Chattopadhyay

WPA 10583 of 2020

With

CAN 1 of 2023

Appejay Infra Logistics Pvt. Ltd. & Anr.

Vs.

Union of India & Ors.

For the petitioners

: Mr. S.N. Mukherjee, Id. Sr. Adv.
: Mr. Sagar Bandopadhyay
: Mr. Rudraman Bhattacharya
: Mr. Lalit Baid
: Mr. Saptarshi Banerjee
: Ms. Saberi Saha

For the respondents

: Mr. Bhaskar Prasad Banerjee
: Mr. Tapan Bhanja

Judgment on

: 15.05.2026

Rai Chattopadhyay, J. :-

(1) Three notices of demand issued against the petitioner No.1/company, for the alleged outstanding amount on account of cost recovery charges, dated (i) April 4, 2016, (ii) July 2, 2020 and (iii) November 10, 2020 respectively and a letter of the respondent dated August 12, 2020, imposing restrictions/suspension of movement of incoming container/cargo, to the Container Freight Station [CFS] of the petitioner No.1/company at Haldia/Kolkata port with effect from August 13, 2020, are under challenge in this writ petition.

- (2) According to the respondent the writ petitioner/company, being the notified operator of the CFS at Haldia port and having been appointed as a 'custodian' under provision of section 45(1) of the Customs Act, 1962 of the goods imported and meant for export through Haldia/Kolkata port, via the said CFS, is obliged to pay to the respondent the cost recovery charges, in lieu of the manpower deployed by the respondent at the CFS, of which the petitioner No.1 is the operator, in accordance with the Regulation and Circular existing in this regard. The respondent says that the petitioner company, though initially has duly fulfilled its legal obligation of payment of cost recovery charges but subsequently has failed to comply with the same with effect from January 1, 2015 and has not remitted the charges any further. Hence, demand has been raised by the respondent firstly vide the notice dated April 4, 2016 and also subsequently vide the other two notices dated July 2, 2020 and November 10, 2020 respectively. However, the exercise culminated into futility as the petitioner company has allegedly never paid any attention to those demand notices for payment of the amount demanded on account of outstanding cost recovery charges.
- (3) Due to non-remittance of the cost recovery charges by the petitioner, as stated to have been demanded in terms of the applicable Regulations, the impugned letter dated August 12, 2020 has been issued against it, imposing restriction/directing suspension of movement of the incoming container/cargo to the company's CFS from Haldia/Kolkata port with effect from August 13, 2020. The said letter reads as follows:

"F.NO. S37(Misc)-102/09P(Pt)SOA

Dated: 12.08.2020

** ** * * * * *

Sub: Restrictions/suspension of movement of incoming container/cargo to M/s Apeejay CFS from Haldia/Kolkata port with effect from 13.08.2020-reg

** ** * * * * *

Due to non-payment of Rs. 5,04,51,775/- (Five crore four lakh fifty one thousand seven hundred and seventy five only) as cost recovery charges for the Custom Officers posted at M/s. Apeejay Infralogistics Pvt. Ltd., CFS of the period from 01.04.2016 to 29.02.2020, the following restrictions have been imposed:

- (i) No new containers/cargo will be allowed to enter into the CFS w.e.f 13.08.2020.***
- (ii) The import/export containers/cargo which have already entered into the CFS as on 12.08.2020, the importers/Exporter/concerned parties are allowed to clear their goods on(or) before 12.09.2020.***

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- (4)** The writ petitioner's case is otherwise; that the said company is not at all obliged under provision of any Regulation or Circular to pay the cost recovery charges to the respondent. The reason therefor has been stated to be due to non-fulfilment of the condition precedent for such charges to have accrued, by way of sanction of post meant for CFS and actual physical deployment of the man power at the CFS. According to the writ petitioners the provision under the Regulation or Circular applicable, require sanction of post and actual physical posting of personnel as against those sanctioned posts. That, in case of the CFS of the petitioner No.1, neither of these conditions have been fulfilled by the respondent. Hence, no liability of the petitioner company arises towards payment of any cost

recovery charges whatsoever. The petitioners have stated that for initial two years of operation such charges have been wrongly paid due its own ignorance of law. Similarly, for that reason only, the petitioner No.1 has once sought to have the benefit of the waiver scheme, though such prayer was absolutely irrelevant and inconsequential due to the fact that the petitioners would not have any liability at all, for payment of cost recovery charges. Hence, no question of seeking any waiver could have arisen at all. The writ petitioners say that as the company would not be liable at all for payment of any cost recovery charges to the respondent for operation of CFS at Haldia, the above stated impugned demand notices may be set aside along with the other letter dated August 12, 2020, as impugned in this case.

- (5)** The relevant facts leading to filing of the instant writ petition is required to be discussed. On June 25, 2012 a Public Notice No. 26/12 was published establishing Container Freight Station [CFS] at Haldia, to be operated by the present petitioner No. 1. On August 13, 2012, the other Public Notice No. 34/12, has been published by the Commissioner of Customs (Port) Kolkata, in exercise of power under Section 45 (1) of the Customs Act, 1962, appointing thereby the petitioner No. 1 as the 'custodian' of the FCL/LCL containers as well as over dimensional and break bulk cargo, imported goods received in containers from Haldia/Kolkata Port and goods meant for export through Haldia/Kolkata Port, via CFS owned and operated by it.

- (6) The said Public Notice dated August 13, 2012 inter alia laid down the conditions that the company had to execute a bond of Rs. 18.60 Crores with surety and furnish a bank guarantee of Rs. 1.86 Crores for a period of two years. It has further been provided that as a 'custodian', the petitioner/company shall have to bear the cost of Customs Officers "posted at the Container Freight Station by the Commissioner of Customs on cost recovery basis". Let the relevant conditions as prescribed in the said Public Notice dated August 13, 2012 be quoted hereinbelow: -

“ Dated the 13th August, 2012

PUBLIC NOTICE NO. 34/12

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2. M/s. Apeejay Infralogistics Pvt. Ltd. as the custodian of the goods meant for Import and Export will comply with the provisions of Section 45 (2) of the Customs Act, 1962 as well as the rules, regulations and instructions issued from time to time on the subject relating to Handling of Cargo in the CFS governed by Handling of Cargo in Customs Areas Regulations, 2009.

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9. The Custodian shall bear the cost of the Customs Officers posted at the Container Freight Station (CFS) by the Commissioner of Customs on Cost Recovery basis and shall make payments in advance on half yearly basis."

The company thereafter was granted approval and started operation of the CFS.

- (7) As per record, the petitioner company has made payment of cost recovery charges as demanded by the respondent authority to the tune of Rs. 1,83,82,420/-, for the period from November 14, 2012 to December 31, 2014. The petitioners say that, this has been done due to ignorance of

it, in spite of no officers of Customs being posted at the CFS during the relevant point of time. That, the petitioners have been unaware of the condition precedent prescribed in the applicable Rules, Regulations and Circulars, that any demand by the respondent of cost recovery charges has to be preceded with sanction of posts and actual physical placement of the officers of Customs at the CFS. The petitioners have stated that such mandatory precondition of sanction of post and placement of officers have never been complied with by the respondent in case of the CFS owned and controlled by the petitioners and hence, the petitioner company is not legally liable to make any payment towards cost recovery charges to the respondent.

- (8)** Permission granted to the petitioners under the Public Notice dated August 13, 2012 which was initially for two years period, was extended for a further period of five years and finally, till August 12, 2019. Since thereafter, operation of CFS under the control of the petitioners has been suspended.
- (9)** Waiver notification dated November 03, 2015 has been issued by the respondent for grant of waiver of cost recovery charges in the manner and extent provided by an earlier Circular dated September 12, 2005. As a one-time measure, waiver of cost recovery charges was granted to the eligible facilities under certain circumstances as specified in the said Circular. The Director General of Human Resource Development was authorized to deal with the request for waiver of cost recovery charges. It also provided that the conditions for grant of waiver shall be same as provided in the Exemption Circular of 2005. The writ petitioner applied

for grant of waiver in terms of Circular dated November 03, 2015. Vide an order dated February 18, 2016 the petitioner's request for grant of waiver was rejected on the ground that the petitioner did not meet the eligibility criteria in terms of the Exemption Circular of 2005.

(10) In the meantime, in the Board Meeting of the Central Board of Excise and Customs dated June 18, 2015, the Board resolved in the following manner: -

"2. Giving the background to the scheme of posting of Customs officers on cost recovery charges borne by the custodians, it was explained that the process begins with the sanction of posts as per prescribed staffing norms; staffing norms were fixed vide Circular No.52/97-Cus., dated 17-10-1997 for ICDs and CFSs and vide Circular No.16/2013-Cus., dated 10-4-2013 for Seaports, Air Cargo Complexes, Airports, Courier Terminals and Diamond Plazas. The next step is the grant of exemption from payment of cost recovery charges when the facility meets the specified performance norms for two consecutive financial years (Ref: F.No.434/17/2004-Cus.IV, dated 12-9-2005 and Circular No.16/2013-Cus., dated 10-4-2013). The exemption is always prospective. Simultaneously, the sanctioned posts are regularized. For the Department, the implication of the sanction of the posts on cost recovery basis is the promotion on ad-hoc basis of the officers from within the sanctioned strength to replace the officers who are deployed on cost recovery basis. The implication of the grant of exemption and regularization of the posts is that the custodian no longer pays the cost recovery charges and the regularized posts get en-cadred in the permanent strength of the Department. It was informed that when considering cases for grant of exemption from cost recovery charges, IFU / D/o Expenditure observed that in some cases the posts were not sanctioned in the first place. This gave rise to the following issues for decision:

i. Whether the sanction of posts could be done ex post facto?

ii. Whether the exemption from payment of cost recovery charges could be granted to eligible facilities even if the posts were not initially sanctioned?

iii. Whether the grant of exemption from payment of cost recovery charges is to be restricted to the number of Customs officers indicated in the staffing norms or could it be granted for the total number of Customs officers actually deployed? This issue is in respect of few facilities that were functioning prior to

fixing of norms for staffing and grant of exemption in April, 2013 and wherein the number of Customs officers already working on cost recovery basis was found to be in excess of the norms.

3. In regard to the outstanding issues mentioned at Para 2 above, the D/o Expenditure has responded as follows:

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ii. DoE cannot sanction posts ex post facto. Such posts may be subsumed in the posts created during the cadre restructuring of CBEC.

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4. DG(HRD), CBEC has examined the comments of D/o Expenditure and have furnished following comments:

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ii. Though the posts were not initially sanctioned, exemption from the payment of cost recovery charges may be granted to the facilities that fulfill the specified performance norms. HRD, CBEC has informed that the annual financial implication of such exemption is Rs.149 cr. This cannot be viewed as financial loss as such since it is Government policy to exempt the cost recovery charges when the facility fulfills the performance norms.

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5. The Board was informed that further, this matter had been discussed with Member (P&V) and DG(HRD) in the meeting chaired by Chairman (CBEC) on 06.05.2015. The consensus arrived was as under:

i. 1,630 diverted posts that were not sanctioned may be subsumed in existing cadre strength.

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6. On the basis of above, following proposals were placed before Board for consideration:

i. Allow, as a one-time measure, Chief Commissioner of Customs to exempt as per norms, cost recovery charges for eligible facilities for which posts were not sanctioned. DG(HRD), CBEC would monitor the action; and

ii. Exempt cost recovery charges for the entire staff sanctioned for which cost recovery charges were taken for eligible

facilities even if it is in excess of the 2013 norms. D/o Expenditure would deal with these cases.

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Thus, the Board decided that:

a) 1,630 diverted posts that were not sanctioned but were diverted to various facilities on cost recovery basis would be subsumed in the Department's existing cadre strength."

- (11)** Subsequently, an office order dated February 23, 2016 was issued stating inter alia that the diverted posts that were not sanctioned but were diverted to various facilities on cost recovery basis has been *subsumed* in the existing cadre strength of Kolkata Customs Commissionerate. From the 'Annexure- A' annexed therewith, it transpires that a total number of eight posts as against the CFS of petitioner No. 1 at Haldia have been subsumed by the respondent in the existing cadre strength of Kolkata Customs Commissionerate.
- (12)** On April 04, 2016, the first impugned demand notice was issued by the respondent authority towards the writ petitioners, demanding cost recovery charges for the period from January 01, 2015 to March 31, 2016, as per Regulation 5 (2) of Regulation of 2009. The "Handling of Cargo in Customs Areas Regulations, 2009" came into operation vide notification No. 26/2009-Cus. (N.T.) with effect from March 17, 2009. Regulation 5 thereof lay down the conditions which have to be fulfilled by a customs cargo service provider like the present petitioner No. 1, to be eligible for the benefit of waiver of cost recovery charges. Regulation 6 of the same provides for the responsibility of such customs cargo service providers. As per Regulation 6(1)(o) the customs cargo service provider has to bear the

cost of the Customs Officers posted by the authority, on cost recovery basis and has to make payment for the same at such rates and manner specified by the Government of India in the Ministry of Finance, unless specifically exempted by an order of the said Ministry.

- (13)** A Circular dated March 23, 2009 is in the nature of clarification of the said Regulations of 2009 mentioned above. Provisions have been made therein for exemption of cost recovery charges. It is necessary that relevant portion from there be quoted: -

“5.1. Regulation 5 provides the conditions to be fulfilled by an applicant who wishes to be appointed as a custodian of the imported/ export goods in a customs area (ICD/CFS etc.). An exhaustive list of infrastructure and operational requirements for efficient handling of imported or export goods has been provided. Further, it may be noted that

sufficient discretion has also been provided for the Commissioner of Customs to decide on the nature of infrastructure and equipments required to be installed at the premises of CCSP. Hence, it may be ensured that all the facilities provided by the custodians are sufficient for efficient handling of cargo. It is clarified that the facilities required for handling cargo at a particular ICD/ CFS etc. need not be the same as at any other ICDs/ CFSS/ other customs areas at another place in the country. However, the facilities should be sufficient to enable efficient handling of the cargo having regard to the volume of containers/ cargo and its nature, etc. required to be handled at the particular ICD/CFS/ customs area. In some of the conditions in the regulations where it has been so specified, the Commissioner of Customs can lay down certain general standards or requirements such as height of boundary wall, quantum and specifications of material handling and other equipments etc., to ensure that the facilities are adequate for effective and efficient handling of cargo.

5.2. As regards the requirement of the Customs EDI Systems under Regulation 5(1)(j), the infrastructure required to be provided by the custodian shall include the

Civil and electrical infrastructure including properly air-conditioned office space, cabins with proper furniture, power backup facilities, hardware, networking and secure connectivity to customs data centres for customs officers and service centres specified by Customs. Facilities required for secure exchange of electronic information between the custodian and Customs shall also be provided. The technical requirements shall be as per the specifications prescribed by the Directorate General of Systems & Data Management. In addition to the above, the requirements as specified vide Board's Circular No.94/2003-Customs dated 31.10.2003 to bring uniformity in automation and to expedite automation process at ICDs / CFSs, shall continue to apply.

5.3. The charges in respect of the Customs officers deployed at the customs clearance facility (ICD/CFS/port/airport etc.) are required to be paid by the Custodian, unless these have been exempted for an individual custodian by an order issued by the Ministry of Finance or by a circular or instructions issued by the Ministry of Finance [Regulation 5(2)]. Payment of cost recovery charges in respect of ports and airports has been exempted for three categories of custodians specified in Circular No.27/2004-Customs dated 6.4.2004. It is clarified that these specified categories of custodians at ports / airports would continue to be exempt from the payment of charges for the customs officers deployed therein.

5.4. In terms of the Greenfield Airports Policy framed by the Government and notified by the Ministry of Civil Aviation for setting up of private greenfield airports, it has been specified that in case of an international airport, the applicant for setting up of a greenfield airport will obtain clearance from the Department of Revenue for provision of Custom services. The cost of providing these services will have to be borne by the Airport Company. Hence, such custodians shall also be required to pay cost recovery charges in terms of the extant policy.

5.5. As regards ICDs / CFSs, Government had taken a decision to waive the requirement of cost recovery charges to be paid by ICD / CFS, if they fulfill the laid down norms and are in existence for a consecutive period of two financial years. These norms include parameters such as the total number of import or export containers handled, the customs declarations filed for import or export, etc. Board's instructions vide D.O. letter F.No.A.11018/12/2008-Ad.IV dated 2.7.2008 refer in this

regard. Accordingly, the eligible ICDs / CFSs which fulfill the laid down criteria are being considered for exemption from payment of cost recovery charges and specific orders in individual cases are issued by Ad.IV Section. These orders are being referred to as the orders issued by the Ministry of Finance under the Regulation 5(2).

5.6. Imported or export goods lying unclaimed, uncleared or abandoned in ICDs / CFSs / customs area shall be disposed of within the specified time by the CCSP who is holding custody of the such goods. [Regulation 6(1)(m)]. Accordingly, it may be ensured that the existing Board's instructions for proper and timely disposal of unclaimed, uncleared or abandoned goods as per Circular No.50/2005-Customs dated 1.12.2005 as amended, are properly followed."

- (14)** After issuance of demand notice by the respondent against the petitioners dated April 04, 2016, the petitioners challenged the same before the Delhi High Court. The petitioner also challenged the order of the respondent dated February 18, 2016 by which the petitioner's prayer for grant of waiver has been rejected. The Division Bench of Delhi High Court has decided the matter vide its judgment dated September 24, 2020. The Court held that, the petitioner's challenge as to Regulation 5 (2) of the Handling of Cargo in Customs Areas Regulations, 2009 was not sustainable in view of the authoritative decision of the Supreme Court in **Allied ICD services Limited Vs. Union of India and Others** reported in **2018 SCC OnLine Delhi 10816**. The Supreme Court in the said judgment has upheld the impugned provision of Regulations. Therefore, the Division Bench of Delhi High Court in the said case only adjudicated the petitioner's prayer regarding invalidity and setting aside of the impugned demand notice dated April 04, 2016 issued by the respondent authority. The Court held further that the petitioner had failed to satisfy conditions for becoming eligible for any exemption and dismissed the writ petition

filed by the same. The Division Bench of Delhi High Court vide its order dated September 28, 2020 noted that the petitioner wishes to challenge the quantification of the cost recovery charges on the grounds other than those mentioned in WP(C) 5581 of 2016. The Court held that the issue of quantification of cost recovery charges has not been decided in the said writ petition but only the question of validity of the provision of the Regulation 2009, has been decided, that is in affirmative.

- (15)** In the meantime, the Joint Commissioner of Customs and SPS issues a letter to the petitioner No. 1 dated July 02, 2020 on demand of cost recovery charges totalling an amount of Rs. 5,04,51,775/- for the Officers posted at the CFS.
- (16)** The impugned letter dated August 12, 2020 was issued thereafter by the authority thereby restricting and/or suspending movement of incoming container/cargo to the petitioner's CFS from Haldia/Kolkata Port with effect from August 13, 2020. The relevant portion of that letter have been quoted above.
- (17)** Finally, the third and last demand notice has been sent by the authority to the petitioner company dated November 10, 2020 demanding the amount of cost recovery charges, stated to have remained due and outstanding for the period from January 01, 2015 to August 12, 2020, totalling a sum of Rs. 6,75,15,678/-, less the amount already realized by the respondent by invocation of the bank guarantee earlier submitted by the petitioner to the tune of Rs. 52,10,000/-.

(18) Hence, in this writ petition, the three demand notices as mentioned above and the letter of imposition of restriction/suspension of movement at the CFS of the petitioner No. 1 dated August 12, 2020 have been challenged with the prayer to set aside all of those.

The petitioner's argument: -

(19) Mr. S. N. Mukherjee, Learned Senior Counsel has appeared for the writ petitioners. He has referred to the Regulations, 2009 and the subsequent clarificatory notification dated March 23, 2009. He says that, sanction of post for the CFS and actual physical deployment of Customs Officers therein are the necessary and mandatory precondition upon which the petitioner's liability to pay the cost recovery charges actually depend.

(20) He has relied on another circular No. 52/97-Cus dated October 17, 1997. It is submitted that as per the same, customs officers/staff are required to be posted on cost recovery basis at customs facilities including CFSs. It is submitted that for the said purpose, posts have to be created and such posts shall operate and continue only with due approval of the competent authority. The competent authority for grant of approval for creation and continuation of posts on cost recovery basis is the Department of Expenditure in the Directorate General of Human Resource Development of the respondent No.2/Central Board of Indirect Taxes & Customs, Government of India, Department of Revenue.

(21) The writ petitioners have alleged that no such post has been either sanctioned or created by the said competent authority

to be deployed at the CFS with respect to which the writ petitioner No.1 is the custodian. Mr. Mukherjee, Learned Senior Counsel, by referring to the circular dated October 17, 1997 has submitted that though staff of all Inland Container Depots [ICDs] and Container Freight Stations [CFSs] notified are referred to therein, the sanction was granted only in respect of the ICDs and not for the CFSs.

- (22)** Mr. Mukherjee, Learned Senior Counsel has further referred to the “Handling of Cargo in Customs Areas Regulations, 2009” and the subsequent clarificatory circular dated September 23, 2009. He says that as per Regulation 6(1)(o) of the same, the petitioner No.1 being a customs cargo service provider, has to bear the cost of the customs officers posted by the Principal Commissioner or the Commissioner of Customs, on cost recovery basis and has to make payment for the same at the stipulated rate and the specified manner. The writ petitioners’ argument is that in order that such charges become payable, a necessary precondition is that the posts be sanctioned and the officers be physically posted at the end of the service provider. According to the writ petitioners in their case, none of these necessary preconditions have been fulfilled by the respondent authority. Hence, they say that any claim of cost recovery charges or of imposition of restriction due to the alleged non fulfilment of the same, to which the petitioner No.1 has been subjected to, tantamount to gross arbitrariness and illegality, on part of the respondent authorities.
- (23)** It is further submitted that as per the circular dated September 23, 2009, the charges in respect of the customs

officers deployed at the customs clearance facility are generally required to be paid by the custodian, unless the same have been exempted. This has been relied on to further buttress the petitioners' contention that actual physical deployment of customs officer is the mandatory prerequisite for recovery of any charges on cost recovery basis from the CFS of the writ petitioner No.1 in this case.

(24) According to Mr. Mukherjee, Learned Senior Counsel, remittance of charges for cost recovery by the writ petitioner for the period from November 14, 2012 to December 31, 2014, to the tune of Rs.1,83,82,420/- or its prayer to seek waiver of such charges have only been due to ignorance of the company about the mandatory prerequisites necessary to be fulfilled for imposition of any such charges. That the petitioner is not at all liable for and cannot be forced to pay the cost recovery charges if the aforementioned conditions precedent are not met, which would require the sanction and creation of a post and the actual physical deployment of the customs officers for any such charges to be applicable in the case of the writ petitioner company.

(25) The writ petitioners have also relied on a statement from the website of the respondent No.7, containing the list of posts sanctioned for creation on cost recovery basis at ICDs/CFSS et cetera for the period from January 1, 2014 to December 31, 2019. On the basis of the same Mr. Mukherjee, Learned Senior Counsel has submitted that no posts on cost recovery basis can be seen to have been sanctioned for the Haldia CFS operated by the petitioners/company during the period from January 1, 2014 to December 31, 2019. It is mentioned that

the petitioner/company's name does not figure in the said list though the same contains names and other related particulars of 85 ICDs and CFSs. For those 85 ICDs and CFSs posts have been duly sanctioned and created on cost recovery basis, since January 1, 2014, but not for the petitioner company.

(26) Lastly, the writ petitioners have expressed their grievance to the respondent authority by dint of a letter dated November 3, 2020 and made request to withdraw the said demand notices and the restriction imposed as regards the operations of the said CFS, which was allegedly illegal and not sustainable. The last demand notice has been issued against the petitioner company dated November 10, 2020, for a total amount of Rs. 6,23,05,678/- for the total period starting from January 1, 2015 till suspension of operation of the petitioner company that is, till August 12, 2020, including deduction of an amount of Rs. 52,10,000/- realised by the respondent after invoking the bank guarantee.

(27) According to the writ petitioner it is an admitted fact that cost recovery posts of Customs officers stood subsumed in the department's existing cadre strength since the diverted posts have been treated as absorbed in the existing cadre strength. That, once those posts were subsumed in the existing cadre strength there is no question of any future liability of the writ petitioner towards payment in respect of the manpower, who got subsumed and regularised in the existing cadre. That, it is only when fresh posts on cost recovery basis for the petitioner's CFS are sanctioned in the manner prescribed, its liability towards making payments on cost recovery basis can

accrue. According to the petitioner it is only for the sake of record and documentation that deployment figure is shown by the respondent in fraction which itself proves that there was no actual physical deployment of any person or even any sanction therefor. Also, that no record is available there pertaining to the purported posting of any Officer there.

(28) The following judgments have been relied on by Mr. Mukherjee, Learned Senior Counsel in support of the arguments advanced by him:

(a) ***Allied ICD Services Limited versus Union of India & Others at 2018 SCC Online Del 10816;*** [cost recovery charges are in the nature of “fee” for services rendered by the customs officers at the concerned CFS; cost recovery charges are to be levied and imposed at a particular rate on the basis of total salary of the officers posted at the CFSs].

(b) ***R.K.Sabharwal & Others versus State of Punjab & Others at (1995) 2 SCC 745.*** [for deployment/posting, a post should exist being duly sanctioned; in other word in absence of a sanctioned post a person cannot be posted or deployed there].

The respondent’s argument: -

(29) The respondent has been represented by Mr. Bhaskar Prasad Banerjee, Learned Advocate. He submits that admittedly the petitioner’s CFS is a ‘customs area’ notified under section 8 of

the Customs Act, vide the public notice dated June 25, 2012. That the petitioner is the designated 'custodian' vide the public notice dated August 13, 2012. Also, that the petitioner by furnishing bond with bank guarantee in favour of the respondent, has undertaken and is duty bound to ensure compliance of the statutory provision as regards payment of charges and indemnify the authorities for loss, if any. Mr. Banerjee has submitted strongly that the petitioner's endeavour to deny enjoyment of the services provided by the customs authorities is condemnable insofar as without the active support of the customs authorities, the CFS of the writ petitioner could not have been operated for such a long period of time. That, in order to run the CFS the petitioner had to compulsorily obtain permission of customs without which it could not have operated at all and the permission includes deployment of customs officer in the CFS of the petitioner. Mr. Banerjee has relied on the affidavit in opposition filed by the respondent to narrate the manner of deployment to the CFS of the petitioner and demand of cost recovery charges from the same.

- (30)** Mr. Banerjee, Learned Advocate has submitted further that in terms of the Handling of Cargo in Customs Area Regulation, 2009, the Commissioner of Customs Port is authorised for overall implementation of the policy including ensuring deployment/posting of the customs officer for normal functioning of the CFS, which has been duly done in case of the writ petitioner. In lieu thereof, it is submitted, that the petitioner is obliged to meet the cost recovery charges. That, only upon the petitioner having undertaken to remit the cost recovery charges in lieu of services to be provided by the

customs officers in the CFS, it has been accorded permission for commencement of operation. He further states that the petitioner has been paying the cost recovery charges for a long period of time without raising any dispute as regards its own liability for the same. That, all on a sudden it has stopped and discontinued remitting the cost recovery charges and challenged as to imposition of the cost recovery charges and also the vires of the regulations before the Delhi High Court. The respondent contends and the petitioner has not denied, that the Delhi High Court has dismissed such challenge by the petitioner, vide an order dated September 24, 2020. According to the respondent the Court has left open the only issue of quantification of cost recovery charges which stands due and payable by the petitioner. Therefore, Mr. Banerjee has submitted that the petitioner has no scope to reopen the issue of applicability of cost recovery charges against the same before this Court, as the issue has already been decided and settled finally by the above order passed by the Delhi High Court.

- (31)** So far as the question of quantification of the cost recovery charges to be remitted by the petitioner is concerned, according to the said respondent the same involves various disputed questions of fact which need to be tested on evidence before an appropriate forum. For the said part of the dispute, according to the respondent, this Court while exercising power of judicial review may not intervene.
- (32)** Failure of the writ petitioner to remit the cost recovery charges as demanded even after rejection of its challenge to the regulations by the Delhi High Court, has led to issuance

by the respondent of the impugned order dated August 12, 2020 directing certain restrictions and suspension of movement of incoming cargo of the writ petitioner. According to the respondent there is no infirmity or illegality as alleged as regards the said order in the facts and circumstances of the present case.

- (33)** Mr. Banerjee, Learned Advocate has stated that the petitioner had been enjoying the commercial benefits by virtue of the permission from the customs and deployment of the customs officers; that, in such circumstances it cannot now contend no liability as regards payment of the cost recovery charges. It is submitted further that actual physical posting of Customs officers at the CFS of the petitioner is a fact evident on records and without the posting/deployment, the CFS of the petitioner could not have functioned. Hence, according to the respondent proportionate charges regarding posting of officers have been demanded from the petitioner similarly as to the other CFSs.
- (34)** It has further been submitted that for a long period of 3 years the petitioner has been protected with the interim order granted by the Delhi High Court dated June 3, 2016, preventing the Department from taking any course of action against it regarding non-payment of cost recovery charges. Therefore, now after dismissal of the petitioner's prayer before the Delhi High Court, the petitioner cannot bring to the fore same challenge by way of filing separate writ petition before this Court. The respondent says that the instant writ petition is barred by the principals of estoppel, acquiescence and also res-judicata.

(35) Mr. Banerjee, Learned Advocate for the respondent has relied on the judgment of the Supreme Court in **Godavari Sugar Mills vs State of Maharashtra** reported at (2011) 2 SCC 439; specifically, paragraph 8 thereof, which runs as follows:-

“8. The observations in Suganmal [AIR 1965 SC 1740] related to a claim for refund of tax and have to be understood with reference to the nature of the claim made therein. The decision in Suganmal [AIR 1965 SC 1740] has been explained and distinguished in several subsequent cases, including in U.P. Pollution Control Board v. Kanoria Industrial Ltd. [(2001) 2 SCC 549] and ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. [(2004) 3 SCC 553] The legal position becomes clear when the decision in Suganmal [AIR 1965 SC 1740] is read with the other decisions of this Court on the issue, referred to below:-

*(i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers. (Vide *Burmah Construction Co. v. State of Orissa* [AIR 1962 SC 1320 : 1962 Supp (1) SCR 242] .)*

*(ii) If a right has been infringed—whether a fundamental right or a statutory right—and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realised by the Government without the authority of law. (Vide *State of M.P. v. Bhailal Bhai* [AIR 1964 SC 1006] .)*

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money. (Vide Sughanmal v. State of M.P. [AIR 1965 SC 1740])

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment, etc. While a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition. (Vide Salona Tea Co. Ltd. v. Supdt. of Taxes [(1988) 1 SCC 401 : 1988 SCC (Tax) 99 (2)] .)

(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there is no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. (Vide U.P. Pollution Control Board v. Kanoria Industrial Ltd. [(2001) 2 SCC 549])

(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. (Vide Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd. [(2005) 8 SCC 242])

We are therefore of the view that reliance upon Suganmal [AIR 1965 SC 1740] was misplaced, to hold that the writ petition filed by the appellant was not maintainable.”

- (36)** Admittedly, the petitioner No.1 was appointed as a “custodian” under Section 45(1) of the Customs Act, 1962 by Public Notice dated August 13, 2012 and was permitted to operate the Container Freight Station at Haldia subject to the express terms and conditions incorporated therein. One of the categorical conditions governing such appointment was that the petitioner “*shall bear the cost of the Customs Officers posted at the Container Freight Station by the Commissioner of Customs on cost recovery basis and shall make payments in advance on half yearly basis.*” The said stipulation was neither ambiguous nor contingent. The petitioner accepted such condition unequivocally, furnished bond and bank guarantee in terms thereof, availed the benefit of operation of the CFS for several years and also admittedly remitted cost recovery charges from November, 2012 till December, 2014. Having consciously accepted the regulatory regime under which the CFS was permitted to function, the petitioner cannot now approbate and reprobate by contending that no liability for payment of cost recovery charges ever existed. The conduct of the petitioner in seeking waiver under the Circular dated November 3, 2015 itself unmistakably demonstrates acknowledgement of the subsisting liability; for, a party who

asserts total absence of liability cannot simultaneously seek exemption or waiver from such liability. The plea that the earlier payments and the application for waiver were made under “ignorance of law” is wholly unacceptable in the case of a commercial entity operating a customs bonded facility under statutory control.

- (37)** The scheme of the “Handling of Cargo in Customs Areas Regulations, 2009”, also militates against the petitioner’s stand. Regulation 6(1)(o) obliges the Customs Cargo Service Provider to bear the cost of the Customs Officers posted by the Commissioner of Customs on cost recovery basis unless specifically exempted by the Government. The provision does not make the liability dependent upon prior formal sanction of posts by the Department of Expenditure in the manner sought to be argued by the petitioner. The materials on record rather demonstrate that Customs personnel were in fact deployed for functioning of the petitioner’s CFS and that the facility itself could not have operated without customs supervision and clearance support. The respondent has specifically disclosed the manner of deployment and the proportional recovery of charges. The petitioner’s contention that there was no actual deployment is contrary to the admitted factual position that import-export activities continued at the CFS under customs control for years together. A Container Freight Station operating under the Customs Act cannot practically function in absence of customs supervision, examination, sealing, clearance and allied regulatory activities. Therefore, the argument that no services were rendered or that no officers were deployed is

wholly misconceived and contrary to the operational realities emerging from the records.

- (38)** The principle of *contemporanea expositio est optima et fortissima in lege* [contemporaneous exposition is the best and strongest in law], also lends support to the respondent's interpretation of the regulatory framework. The consistent executive understanding of the Regulations of 2009, the Public Notices, Circulars and administrative practice unmistakably indicate that operators of ICDs/CFSs are liable to bear the expenses of customs personnel deployed for facilitation and supervision of customs operations unless specifically exempted. Such contemporaneous administrative construction, particularly in matters involving specialised fiscal and customs administration, deserves due weight unless shown to be manifestly arbitrary or contrary to statute. The petitioner has failed to establish any such inconsistency. On the contrary, the petitioner's own conduct over several years in remitting cost recovery charges accords with the respondent's interpretation of the regulatory scheme.
- (39)** The subsequent subsuming of diverted posts into the existing cadre strength of the department also does not extinguish the petitioner's liability retrospectively or prospectively in the manner contended. The Board proceedings dated June 18, 2015 and the office order dated February 23, 2016 merely indicate an administrative exercise by which diverted posts earlier functioning on cost recovery basis were absorbed within the departmental cadre strength. Such internal administrative regularisation cannot automatically obliterate the contractual and statutory obligation already undertaken by the petitioner under the Public Notice and the Regulations

of 2009. The decision of the Board itself records that exemption from payment of cost recovery charges is not automatic but is dependent upon fulfilment of prescribed performance norms and issuance of specific exemption orders. Admittedly, the petitioner's prayer for waiver/exemption was rejected on February 18, 2016 on the ground of ineligibility. Therefore, in absence of any specific exemption order granted in favour of the petitioner, the liability under Regulation 6(1)(o) continued to operate.

- (40)** The petitioner's argument that in absence of formally sanctioned posts no liability could arise, proceeds on an overtechnical reading divorced from the substance and object of the statutory framework. In fiscal and regulatory jurisprudence, courts consistently recognise the doctrine of substance over form, particularly where commercial entities seek to avoid obligations despite actually availing services and benefits. The material consideration is not merely the internal nomenclature or administrative classification of posts within the customs establishment, but whether customs infrastructure, supervision and manpower were made available for operation of the petitioner's CFS. The records clearly establish that customs functions were continuously discharged in relation to the petitioner's facility and that the CFS functioned under active customs control. The petitioner therefore cannot evade liability by relying upon internal administrative arrangements regarding cadre sanction or absorption of posts.
- (41)** Though Mr. Mukherjee, Learned Senior Counsel has emphasized in his argument on the doctrine of strict compliance, according to the Court in the facts of the case,

the doctrine of substantial compliance would be the appropriate principle to be applied here. The doctrine of substantial compliance is a legal principle allowing the Court to accept a party's actions as valid, if they meet the essential purpose of a law, despite missing minor procedural formalities. It acts as an equitable tool to prevent technicalities from overriding justice when the core objective is achieved. The key aspect of the doctrine is that, it differentiates between mandatory, substantive requirements (which need strict adherence) and directory, procedural steps (which can be relaxed). This doctrine prevents harsh consequences and ensures that if genuine efforts have been made to comply and achieve the "intended use" or "objective", technical flaws do not invalidate the action, though by its application, fundamental statutory requirement to constitute the essence of the law cannot be touched.

(42) In a recent judgment in ***Sumita Jha Vs. Aaone Developers Private Limited [2025 SCC OnLine SC 1822]***, the Supreme Court, though was dealing with absolute different fact situation as well as legal context, has propounded a principle that "substantial compliance", in simple terms, refers to a pragmatic approach whereby Courts in exceptional circumstances, recognize a party's partial or not-so-strict adherence to the statutory procedural requirements, provided the basic legislative intent is fulfilled.

(43) This Court also finds considerable force in the respondent's objection founded on principles of res judicata, estoppel and acquiescence. The petitioner had earlier challenged the validity and applicability of the very levy before the Delhi High Court. The Division Bench by judgment dated September 24,

2020 rejected such challenge and upheld the regulatory framework governing levy of cost recovery charges. The subsequent clarification dated September 28, 2020 left open only the issue of quantification of charges on grounds not decided earlier. Therefore, the petitioner cannot be permitted to reargue before this Court the foundational issue that no liability for payment of cost recovery charges exists at all. Such an attempt amounts substantially to reopening an issue already adjudicated inter parties. The limited question surviving after the Delhi proceedings could only relate to quantification, which necessarily involves disputed factual issues regarding deployment, staffing pattern and calculation of recoverable amount. Such disputed questions are not amenable to adjudication in exercise of writ jurisdiction.

- (44) The judgments relied on by the petitioner are distinguishable on facts and principle. The decision in **Allied ICD Services Limited (supra)** does not assist the petitioner; rather, it supports the respondent. The said judgment recognises that cost recovery charges are levied in respect of services rendered by Customs officers deployed at the concerned customs facility. In the present case, the existence of customs supervision and operational support is evident from the continued functioning of the petitioner's CFS under statutory control. The issue in the present case is not the constitutional validity of the levy but the petitioner's attempt to evade liability despite availing the benefits of the regulatory arrangement for years together. Similarly, the reliance placed on **R.K. Sabharwal (supra)** is also misplaced. The said judgment was rendered in an altogether different context concerning reservation and operation of sanctioned posts in

public employment. The principles laid down therein cannot be mechanically imported into the regulatory framework governing customs administration and cost recovery arrangements under the Customs Act and the Regulations of 2009. The question before this Court is not whether a public servant can hold a non-sanctioned post, but whether the petitioner, after availing customs services and operating under statutory permission, can deny liability towards cost recovery charges on the basis of internal administrative modalities concerning cadre sanction. The ratio of the said judgment has no application to the controversy involved herein.

- (45)** The challenge to the impugned communication dated August 12, 2020 also fails. Once the petitioner persistently defaulted in payment of cost recovery charges despite repeated demands, the respondent authorities were justified in imposing operational restrictions upon the CFS in order to protect revenue and ensure regulatory compliance. The restriction imposed was neither arbitrary nor disproportionate but a consequential administrative measure flowing from continued non-compliance by the petitioner. In the facts of the present case, the respondent authorities cannot be faulted for taking such action after the petitioner failed to honour its admitted obligations under the governing statutory and contractual framework.
- (46)** This Court is also mindful of the limited scope of judicial review in contractual or fiscal matters involving specialised statutory frameworks. Unless manifest arbitrariness, mala fides, patent lack of jurisdiction or violation of statutory mandate is demonstrated, Courts exercising jurisdiction

under Article 226 ordinarily refrain from interfering with administrative decisions taken in the realm of economic regulation and revenue administration. The impugned demands are founded upon the governing Regulations, the conditions of appointment accepted by the petitioner and the actual operational arrangement prevailing between the parties over several years. No perversity or jurisdictional error has been demonstrated warranting interference in exercise of constitutional writ jurisdiction.

- (47)** The petitioner's challenge also falls foul of the doctrine of estoppel by conduct. Having represented through its conduct that it accepted the levy and the corresponding regulatory framework — first by furnishing security, thereafter by remitting charges over a substantial period and subsequently by applying for waiver under the applicable circulars — the petitioner cannot now be permitted to assert a position fundamentally inconsistent with its earlier representation, especially when the respondent authorities altered their position and continued deployment and facilitation arrangements on that basis. Public law remedies under Article 226 are equitable in nature, and a litigant approaching the writ court must do so with consistency, candour and fairness. The conduct of the petitioner does not satisfy those equitable standards. Accordingly, this Court finds no illegality, arbitrariness or procedural impropriety in the impugned demand notices or in the consequential order imposing restriction upon operation of the petitioner's CFS. The writ petition therefore deserves dismissal.

- (48)** Hence, for the reasons discussed above, the instant writ petition No. WPA 10583 of 2020 is dismissed; application pending if any, stands disposed of.
- (49)** Urgent certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Rai Chattopadhyay, J.)