

# Imposing Demurrage During Lockdown

June 22, 2020 | [2020] 117 taxmann.com 243 (Article)



*"In the interests of the prosperity of the country, a king should be diligent in foreseeing the possibility of calamities, try to avert them before they arise, overcome those which happen, remove all obstructions to economic activity and prevent loss of revenue to the state"*

- Kautilya, Arthashastra<sup>1</sup>

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### THE FACTUAL BACKGROUND

The mankind remains imperilled by the outbreak of Coronavirus Disease 2019 ('COVID-19'). Its severity can be judged from the fact that globally within 6 months it has claimed lives of well over 4 lakh people.<sup>2</sup>The World Health Organisation has declared COVID-19 as a pandemic and a public health emergency of international concern.<sup>3</sup>All countries have shown solidarity in tackling the pandemic. Scientists are working tirelessly to find a cure or vaccine for the disease and so are the members of our medical fraternity, who have been selfless soldiers in this battle. Many corporate organisations have come forward to donate in large proportions to ensure that mankind continues to effectively battle the disease. Amidst the circumstances, in the bid to control the spread of disease, the Government of India was constrained to invoke the Disaster Management Act, 2005 and declare nation-wide lockdown orders. While the lockdown was necessary amidst the medical emergency, economy had to suffer colossal impact on account of the operational standstill. Needless to say the unprecedented circumstances resultantly has given birth to unprecedented legal issues.

Due to lockdown orders, consignments which arrived post the lockdown could not be cleared from the customs. The Ministry of Civil Aviation ('MoCA') issued an **Order dated April 1, 2020 ('MoCA Order')** whereby it granted concession from levy of demurrage to the extent of 50 per cent on imported goods which arrived in India on or after March 20, 2020. However, this concession was only available if the imported goods were cleared on or before April 16, 2020. The Ministry of Home Affairs *vide* its Order dated April 15, 2020, *i.e.* Order-2 (refer *infra*), had lifted the restrictions on inter-state and intra-state transportation of non-essential goods. However, in reality such orders were not implemented at ground level and State Government authorities prohibited movement of trucks and goods carrier carrying non-essential goods across borders. The MoCA despite being well aware has not extended the cut-off date of April 16, 2020, which has essentially led to the denial of the concession to a significant majority.

The authors in this article have assessed the question of importers' liability to pay demurrage for failure to clear the imported goods during the operations of Order-2 and the constitutionality of cut off stipulated in the MoCA Order. Firstly, let us outline the various lockdown orders issued by the Central Government.

### Declaration of lockdown

Depending on the severity of the circumstances, the Ministry of Home Affairs issued various orders under Section 10 of the Disaster Management Act, 2005,

revising the lock down measures from time to time beginning March 24, 2020. These orders *inter alia* listed out the activities which were permitted to be undertaken during the period of their validity. The details of orders, their period of validity and activities permitted to be undertaken thereunder are tabulated as under:

<b>Date</b>	<b>Period</b>	<b>Activities permitted or not permitted</b>
March 24, 2020 ( <b>'Order-1'</b> )	March 25, 2020 to April 14, 2020 ( <b>'Period-1'</b> )	<b>Paragraph 5:</b>  <i>"Industrial establishments will remain closed"</i>  <b>Paragraph 6:</b>  <i>"All transport services - air, rail, roadways - will remain suspended."</i>
<i>Exceptions:</i>		
<ul style="list-style-type: none"> <li>a. <i>Transportation for essential goods only.</i></li> <li>b. <i>Fire, law and order and emergency services"</i></li> </ul>		
April 15, 2020 ( <b>'Order-2'</b> )	April 15, 2020 to April 30, 2020 ( <b>'Period-2'</b> )	<b>Paragraph 12:</b>  <i>"Movement, loading/unloading of goods/cargo (inter and intra State) is allowed, as under:</i>  <ul style="list-style-type: none"> <li>i. <i>All goods traffic will be allowed to ply.</i></li> <li>ii. <i>...</i></li> <li>iii. <i>Movement of all trucks and other goods/carrier vehicles with two drivers and one helper subject to the driver carrying a valid driving licence; an empty truck vehicle will be allowed to ply after the delivery of goods, or for pick up of goods."</i></li> </ul>
May 1, 2020 ( <b>'Order-3'</b> )	May 1, 2020 onwards ( <b>'Period-3'</b> )	<b>Paragraph 11:</b>  <i>"All States/UTs shall allow inter-state movement of goods/cargo, including empty trucks"</i>

The trade had placed orders with their overseas vendors for purchase of various non-essential goods(**'imported goods'**). Several consignments of such imported goods arrived at the airports after declaration of the '*Janta Curfew*' on March 19, 2020. In terms of Order-1, clearance and transportation of the imported goods was prohibited during Period-1, and thus their clearance from customs was out of question. While Order-2 permitted the transportation of imported goods across states, practically the inter-state borders were sealed and transportation of non-essential goods was restricted by the state authorities. In these circumstances, it became practically impossible for the importers located in States different from the State in which airport of import is located to clear the goods from customs and transport the same to their premises. It was only after issuance of Order-3 that inter-state movement of non-essential goods became a practical possibility.

### **Levy and exemption from demurrage**

At this juncture, it is pertinent to refer to the provisions concerning imposition of demurrage. The Airports Authority of India (**'AAI'**) has established warehouses and cargo complexes at the airports for storage of goods. The Airports Authority of India (Storage and Processing of Cargo, Courier and Express Goods and Postal

Mail) Regulations, 2003 ('Regulations') formulated under Section 42 of the Airports Authority of India Act, 1994, provides for levy of demurrage. The term 'demurrage' as defined in Regulation 2(n) refers to the charges payable on goods are stored in cargo complexes beyond the stipulated free storage period of 5 days. The Ministry of Civil Aviation ('MoCA') issued an **Order dated April 1, 2020**<sup>4</sup> ('MoCA Order') whereby it granted concession from levy of demurrage to the extent of 50 per cent. on imported goods which arrived in India on or after March 20, 2020, subject to their clearance on or before April 16, 2020. The importers having their business premises in States different from the State in which airport of import is located could not avail the benefit of aforesaid concession, inasmuch as they could not clear the imported goods by April 16, 2020 for reasons depicted in above paragraphs.

## **TESTING THE CUT-OFF DATE ON THE ANVIL OF ARTICLE 14 OF CONSTITUTION OF INDIA**

### **Scope of Article 14 of the Constitution of India, 1950**

The Constitution of India, 1950 ('Constitution') provides for creation of three organs of the state: (i) the legislature; (ii) the executive; and (iii) the judiciary (*triaspolitikas*).<sup>5</sup> The legislature is vested with the power to frame the laws, the executive to implement the laws and the judiciary interpret and apply the laws by adjudicating disputes surrounding their applicability. The legislations framed by the legislature, delegated legislations framed by executive in exercise of the legislative powers validly delegated by the legislature are required to be in consonance with the Constitution. Constitution, in the words of famous jurist Hans Kelson, forms the 'grund norm' with which each law framed thereunder is required to comply with at all times. Part III of the Constitution provides for fundamental rights, including 'right to equality' enshrined in Article 14, the extract of which is reproduced as under:

*"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"*

Article 14 employs two phrases: (i) equality before law; and (ii) equal protection of laws. While the former is a negative concept implying absence of any special privileges, the latter is a positive concept in favour of individuals implying equally subjecting all classes to the ordinary law. The two concepts work in conjunction to ensure equal justice. Article 13 prohibits 'state' from making any 'law' which abridges the fundamental rights, including right to equality under Article 14. Clause 3 thereof defines the term 'law' to specifically include orders, notifications and regulations. Further, Article 12 defines the expression 'state' to specifically include Parliament and Government of India, and other authorities. It is trite law that Ministry of Civil Aviation and AAI qualify as 'state' under the expressions 'Government of India' and 'other authorities'<sup>6</sup> respectively. Thus, it is clear that MoCA Order and Regulations framed by AAI are required to uphold the principle equality enshrined in Article 14 of the Constitution. The validity of provisions contained therein will go for a toss in case the same abridge Article 14 in any manner.

### **The unequal administration of Order-2 perpetuated inequality**

As noted above, the Order-1 had suspended the transportation of all non-essential goods. It was impossible for any importer to clear imported goods during Period-1. Acknowledging the practical impossibility to clear the imported goods, MoCA issued Order dated April 1, 2020 providing for concession on levy of demurrage, subject to the goods being cleared by April 16, 2020. It seems that that cut-off date

of April 16, 2020 was fixed presuming that the transportation of goods, whether essential or non-essential, will resume for intra-state and inter-state purposes, upon the expiry of the Period-1 i.e. April 14, 2020. The MoCA accordingly thought it reasonable to stipulate the cut-off date as April 16, 2020 for clearance of imported goods from customs as a necessary condition. The Ministry of Home Affairs subsequently *vide* Order-2 expressly permitted movement of goods traffic, all trucks, goods/carrier vehicles carrying essential as well as non-essential goods, for all intra-state and inter-state purposes (*Refer Paragraph 12 of Order 2*). Thus, in *strictosensu* an importer was allowed to clear the goods from customs during Period-2 and transport the same to its business premises. However, in the actual scenario, the goods/carrier vehicles carrying non-essential goods were not allowed to cross the inter-state borders.

The impediments in the inter-state movement of non-essential goods was duly acknowledged by the Home Secretary, Ministry of Home Affairs in a clarification letter bearing **D.O. No. 40-3/2020-DM-I(A) dated April 30, 2020('Clarification')** addressed to Chief Secretaries of States whereby the state authorities were directed to ensure unhindered movement of trucks and good carriers including empty trucks. The relevant extract of paragraph 2 is reproduced as under:

*"...it has been reported that at inter-state borders in different parts of the country, movement of trucks is not allowed freely and local authorities insist upon separate passes"*

Any importer having its premises in a State different from the State of airport at which goods were imported, would as a natural corollary be prevented from clearing and bringing the goods to its premises. Fearing any untoward losses resulting from goods being stuck at inter-state border, an importer would be likely to refrain from clearing the goods from customs, especially in cases where the imported goods are sensitive and of high value. Such adverse circumstances were also evidenced in many media reports widely circulated at the relevant time<sup>7</sup>. Now, given the circumstances, the importers situated in the same State in which airport of import is located may have been in a position to take advantage of MoCA Order by clearing the goods within the cut-off date of April 16, 2020. However, persons located in other States faced with the inter-state transportation restrictions could not benefit from the concession, thereby creating inequality. It is clear that the cut-off date of April 16, 2020 specified in MoCA Order for grant of concession from levy of demurrage is disassociated from the manner in which Order-2 was being applied. The inequality caused due to arbitrary application of Order-2 (allowing free movement of trucks and goods carriers) by prohibiting cross border transportation of non-essential goods became the cause of putting importers in an odd predicament.

It is trite that all functionaries/organs of 'state', legislature, executive and judiciary, are intertwined. Even if a law is framed equally, its unequal administration will perpetuate inequality, which will not withstand the test of right to equality under Article 14. In the aforesaid facts and circumstances, the demand for extension of cut-off date for concession on levy of demurrage till at least a reasonable date after May 1, 2020, where after the inter-state transport restrictions were in fact resolved may be validly made. The Government's omission to extend the cut-off date of April 16, 2020 under MoCA Order is arbitrary, irrational, discriminatory and unreasonable leading to exclusion of certain segment of persons from availing the concession.

**WRIT PETITIONS FILED BEFORE DELHI HIGH COURT ON SIMILAR ISSUES**

In this context, it is pertinent to highlight that certain importers have preferred writs:

- *Polytech Trade Foundation v. UoI*, W.P.(C) 3029/2020;
- *Indian Agro and Recycled Paper Mills Association v. CBIC*, W.P.(C) 3195/2020; and
- *Material Recycling Association of India v. UoI*<sup>8</sup>

The abovementioned cases pertain with levy of demurrage on goods imported in vessels at port of import. For ports, the Ministry of Shipping had issued an advisory. However, certain private ports have refused to adhere to the advisory on the ground that it did not form a mandatory binding policy on them. The importers in these petitions have now approached the Courts seeking directions that private ports too adhere to the advisory.

Evidently, the case of levy of demurrage on goods imported in vessels at a port of import is different from that in case of goods imported in aircrafts at an airport of import. The instant article deals only with goods imported in aircrafts at an airport of import wherein the MoCA has issued order binding the AAI with respect to collection of demurrage. It is not the case that Cargo Terminal Handling Agencies are imposing demurrage in violation of any exemption order. In the case of *Saga Freights Express Private Limited and Another v. Union of India*, W.P.(C) 3022/2020, the petitioner has preferred writ petition on seemingly identical issue, i.e. eligibility of concession from levy of demurrage in respect of imported goods brought into India from aircraft at an airport of import, which could not be cleared by April 16, 2020.

## CONCLUSION

In these trying times, it is government's duty to support stakeholders by implementing policies which aid and alleviate the impact caused. The role of state in calamities has been aptly elucidated by the great Kautilya in Chapter 8 Verse 4 of Arthashastra, where he says that it is the duty of king/state to foresee the possible calamities, avert them before they arise, overcome them and remove all obstructions to the economic activity.<sup>9</sup>The industry even prior to the lockdown was facing slump in demand, and the outbreak of COVID-19 has forced them to shut all operations. In such times, the levy of demurrage on an importer for no fault on his part not only pinches the pocket, but becomes another cause of distress. The MoCA vide its MoCA Order on April 1, 2020 considering the unprecedented circumstances and the impossibility of clearing imported goods from the customs, made a policy decision to provide the concession from levy of demurrage subject to the condition that imported goods will be cleared by April 16, 2020 (within 2 days after the expiry of Period 1).As on April 1, 2020, MoCA's decision to stipulate April 16, 2020 as cut-off date for clearance of imported goods was justified considering that Order-1 was valid till April 14, 2020 and Order 2 allowed inter-state movement of non-essential goods. However, subsequently, once the actual hindrances and restricted were revealed, MoCA ought to have extended the cut-off date for clearance of imported goods from customs having regard to the practical impossibility in inter-state movement of non-essential goods. The omission on part of MoCA in providing the extension of concession is arbitrary, unreasonable and discriminatory and as such violates the 'right to equality' enshrined in Article 14 of the Constitution.<sup>10</sup>

AAI has laid down policy for waiver of demurrage ('**Waiver Policy**') in terms of the Regulations. In terms thereof, any person aggrieved by imposition of demurrage, can prefer an application before the AAIR within 15 days from passing



of *out-of-charge* order. The Waiver Policy allows condonation of delay to the extent of 30 days. Given that presence of alternate remedy is a judicially recognised ground for rejection of writ, it would be advisable for importers to file an application under Waiver Policy for grant of exemption from levy of demurrage first, before preferring writ before High Courts.

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1. Refer Kautilya's Arthashastra from the translation by Rangarajan (1992:108).
  2. Data obtained from website of World Health Organisation accessible at <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>> (last accessed on June 18, 2020).
  3. Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), World Health Organization (WHO), January 30, 2020 and WHO Director-General's opening remarks at the media briefing on COVID-19 dated March 11, 2020.
  4. Order F. No. AV-29012/41/2020-ER dated April 1, 2020.
  5. Refer the Doctrine of Separation of Powers.
  6. *Ramana Dayaram Shetty v. International Airports Authority of India*, 1979 SCR (3) 1014.
  7. No separate pass for trucks, goods carriers, reiterates MHA, Outlook, accessible at <<https://www.outlookindia.com/newsscroll/no-separate-pass-for-trucks-goods-carriers-reiterates-mha/1819969>>.
  8. Importers move SC on violation of government norms pertaining to port charges, Indian Express, June 3, 2020, accessible at <<https://indianexpress.com/article/business/importers-move-sc-on-violation-of-govt-norms-pertaining-to-port-charges-6439649/>>.
  9. While it is agreeable that coronavirus is novel, the outbreak of such a disease was foreseeable. In fact, Bill Gates gave a Ted Talk in March 2015 on the topic: 'The next outbreak? We're not ready'. In his speech, he predicted outbreak of a disease caused by a virus which spreads through air and also lamented on each country's lack of preparedness in tackling the same. However, even 5 years down the line, the situation remained the same. It is this unpreparedness which has caused the uneven application of policies.
  10. The omission to extend the cut-off date also violates 'Doctrine of legitimate expectation'.