

CASE NO.:
Appeal (civil) 1407 of 2002

PETITIONER:
OM SHANKAR BIYANI

Vs.

RESPONDENT:
BOARD OF TRUSTEES, PORT OF CALCUTTA & ORS.

DATE OF JUDGMENT: 22/02/2002

BENCH:
Syed Shah Mohammed Quadri & S.N. Variava

JUDGMENT:

S. N. VARIAVA, J.

Leave granted.

Heard the learned counsel for the parties.

This Appeal is against an Order dated 27th July, 2000.

Briefly stated the facts are as follows:

The Appellant had imported into India, from Singapore, a consignment of bearings. The said consignment landed at the Port of Calcutta on 13th July, 1989. The Appellant submitted a Bill of Entry for home consumption for clearance of the said goods. The said goods were assessed by the Customs and valued at Rs. 1,24,691/-. However, on 1st August, 1989 before the goods could be cleared by the Appellant the Customs Authorities passed a seizure order under Section 110 of the Customs Act. The Appellant then filed a Writ Petition in the High Court of Calcutta. To this Writ Petition the 1st Respondent was not a party.

On 27th September, 1989 an interim order was passed, whereunder the Appellant was permitted to clear the goods on payment of duty as assessed on the basis of the CIF value as appearing in the invoice. However, the Appellant had to furnish to the Customs Authorities a bank guarantee to pay the difference between the duty found payable on a proper assessment and the duty being then paid by the Appellant. The Customs Authorities were also allowed to take a sample of the goods for necessary testing. This interim order did not provide that the Appellant could clear the goods without payment of the charges due to the 1st Respondents. Thus the Appellant could have cleared the goods only after payment of the charges payable to 1st Respondent.

The Customs Authorities then applied to the Calcutta High Court for modification of the earlier order. The Customs Authorities opposed clearance of the goods. On 15th December, 1989 the earlier order was modified. It was directed that the goods could be stored in a bonded warehouse of the Customs Authorities. To be noted that at this stage also the 1st Respondents are not a party to the Writ Petition.

Therefore the goods could be cleared from custody of the 1st Respondent only on payment of all charges payable to the 1st Respondent.

Taking advantage of the order dated 15th December, 1989 the Appellant sought to remove the goods and put them into the bonded warehouse without payment of the charges due to the 1st Respondent. This was not allowed by the 1st Respondent. The Appellant then joined the 1st Respondent as a party to the Writ Petition. On 2nd February, 1990 the High Court passed an Order, in the presence of the 1st Respondent, permitting the Appellant to remove the goods to the bonded warehouse without payment of the port charges. The 1st Respondent was directed not to raise any objection. The High Court merely accepted an undertaking from the Appellants to pay all charges as well as the custom duty upon an effective adjudication of the matter.

At this stage it would be appropriate to note certain provisions of the Major Port Trusts Act. Section 58 of the said Act reads as follows:

"58. Time for payment of rates on goods.- Rates in respect of goods to be landed shall be payable immediately on the landing of the goods and rates in respect of goods to be removed from the premises of a Board, or to be shipped for export, or to be transhipped, shall be payable before the goods are so removed or shipped or transhipped.

(emphasis supplied)"

Thus the charges of the 1st Respondent are to be paid before the goods are removed. The High Court seriously erred in permitting removal of the goods without payment of the port charges. To be noted that it was never disputed that the charges were payable. The 1st Respondent was not concerned with the dispute as to who had to pay the charges. It was the Appellant who was interested in clearance of the goods. It was for him to have paid the charges and cleared the goods. Even if it was the Appellants' case that the Customs Authority had to pay the charges, the Appellant should have first cleared the goods by paying charges due to the 1st Respondent and then claimed reimbursement from the Customs Authority.

Now Section 59 of the Major Port Trusts Act may be noted. It reads as follows:

"59. Board's lien for rates.- (1) For the amount of all rates leviable by a Board under this Act in respect of any goods, and for the rent due to the Board for any building, plinths, stacking areas, or other premises on or in which any goods may have been placed, the Board shall have a lien on such goods, any may seize and detain the same until such rates and rents are fully paid.

(2) Such lien shall have priority over all other liens and claims, except for general average and for the ship-owner's lien upon the said goods for freight and other charges where such lien exists and has been preserved in the manner provided in sub-section (1) of section 60, and for money payable to the Central Government under any law for the time being in force relating to customs, other than by way of penalty or fine."

Thus, 1st Respondent has a statutory lien. It is entitled to retain the goods until all amounts payable to it are paid. By directing removal of goods from the custody of the 1st Respondent without payment of their

charges, the High Court was also setting at naught the statutory lien.

Being aggrieved the 1st Respondents filed an Appeal against the Order dated 2nd February, 1990. The Appellate Court rightly stayed the Order dated 2nd February, 1990.

The Customs Authority withdrew the seizure Order on 19th December, 1989. Now the Appellant was free to clear the goods by payment of all charges to the 1st Respondent. The Appellant made no efforts to clear the goods by payment of the charges. Thus the Appellant allowed the goods to remain with the 1st Respondent knowing full well that further demurrage charges would be incurred.

On 16th September, 1991 a single Judge of the Calcutta High Court disposed of the Writ Petition filed by the Appellant. By this Order the Customs Authorities were directed to complete adjudication proceedings within a particular time. It was directed that if the adjudication proceedings were decided in favour of the Appellant, then the Customs Authorities would pay the demurrage charges for the period of detention. It was held that as the 1st Respondent had opposed removal of the goods into the bonded warehouse, they had exercised their right of lien. It was held that once they exercised their right of lien they were not entitled to claim any demurrage charges. It was held that the 1st Respondent could claim demurrage charges only up to 2nd February, 1990. It was further held that if the Appellant had, by that time, paid the demurrage charges upto 2nd February, 1990 the Customs Authorities would reimburse the Appellant for the same. Mr. Nageshwar Rao, produces letters dated 25th September, 1991 and 11th October, 1991 and submits that the Appellants had offered to pay charges till 2nd February, 1990.

The 1st Respondent filed an Appeal. By an interim Order dated 16th November, 1991 the Appellants were permitted to clear the goods on payment of demurrage up to 2nd February, 1990 and on furnishing a Bank Guarantee in the name of the Chairman of the 1st Respondent. The Bank Guarantee was to be for the charges of the 1st Respondent from 3rd February, 1990 till the date of Bank Guarantee. The Appellants now did not pay the charges up to 2nd February, 1990 nor furnished the Bank Guarantee. They allowed the goods to remain with the 1st Respondent knowing full well that further demurrage charges were being incurred.

The Appeal of the 1st Respondents was disposed of by the impugned Order dated 27th July, 2000. The directions of the learned single Judge directing the 1st Respondent to recover only till 2nd February, 1990 has been set aside. It is held that the 1st Respondent can recover charges for the entire period the goods remain with it.

Mr. Nageshwar Rao submits that the order of the learned single Judge was absolutely correct. He submits that the right of lien under Section 59 of the Major Port Trusts Act is similar to a lien exercised by a bailee under Section 171 of the Indian Contract Act. He submits that once a right of lien has been exercised the bailee cannot charge rent for storage of goods.

Mr. Nageshwar Rao relies upon the case of Board of Trustees of the Port of Bombay v. Sriyaneesh Knitters reported in (1999) 7 SCC 359. In this case the Port Trust Authorities were claiming lien not under Section 59 of the Major Port Trusts Act but under Section 171 of the Indian Contract Act. The question before the Court was whether the Port Trust Authorities could claim a lien both under Section 59 of the Major Port Trusts Act and under Section 171 of the Indian Contract Act. This Court held that when the Port Trust Authorities stored the goods a relationship of bailor and bailee came into existence. It was held that the Port Trust Authorities could claim a lien under Section

171 of the Indian Contract Act also. In our view, this authority does not support the proposition that principles which apply to a lien under Section 171 would also apply to the statutory lien under Section 59.

Statutorily the 1st Respondent is entitled to claim payment of all demurrage charges before the goods were cleared. The Appellants never offered to pay the demurrage charges. They sought to misuse the Order of the Court and take the goods out of the custody of the 1st Respondent without payment of their charges. The 1st Respondent was fully justified in refusing to allow such clearance. The Appellate Court was right in concluding that the 1st Respondent was entitled to recover all charges till the date the goods remained with it.

In our view the proposition that the bailee, who exercises a lien, is not entitled to charge rent for storage of goods can never apply to a case where the lien is exercised for non-payment of rent or storage charges. If such a proposition were to be accepted it would lead to catastrophic results. It is well known that in most cities, particularly port cities like Calcutta and Mumbai, storage space is at a premium. If such a proposition were accepted then all that a person need to do is to make a demand for removal of the goods without offering to pay the storage charges. If the bailee were to refuse to allow clearance and exercise his right of lien, as he is bound to do, the bailor's purpose would be served. He would thereafter have rent free storage space. He could then continue to store the goods free of rent. On the other hand, if the bailee were to permit clearance, in almost all cases, his charges would not be subsequently paid and he would have to then pursue the bailor for recovery of his charges. This could never be the law.

Faced with this situation, Mr. Nageshwar Rao submits that the 1st Respondent should have exercised their power of sale under Section 62 of the Major Port Trusts Act. He submits that it was the duty of the 1st Respondent to sell off the goods. He submits that the 1st Respondent cannot be permitted to continue to levy demurrage charges when they themselves do not sell off the goods. He submits that after they obtained a stay on 11th May, 1990 the 1st Respondent should have sold off the goods. He submits that the 1st Respondent should not be allowed to claim demurrage charges after 11th May, 1990. We are unable to accept this submission. Till 19th December, 1989 the goods were under a seizure Order. Thus they could not have been sold. Before 19th December, 1989 the Appellant had already obtained Orders dated 27th September, 1989 and 15th December, 1989. These Orders permitted clearance of the goods. Thus the 1st Respondent could not sell the goods. The 1st Respondents were further directed by Order dated 2nd February, 1990 not to raise any objection to the goods being cleared. Even though they obtained an Order of stay of clearance they could not have sold off the goods when the subject matter of clearance of goods was before the Court. Thereafter by Order dated 16th September, 1991 the High Court again permitted clearance of goods. The interim Order dated 16th November, 1991, in the Appeal filed by the 1st Respondents, also permitted clearance on furnishing a Bank Guarantee. At no stage did the Appellant inform the 1st Respondent that they were not going to furnish a Bank Guarantee. Thus the 1st Respondent could not have sold the goods.

Mr. Nageshwar Rao then submits that the 1st Respondent had applied to the Appellate Court for permission to sell the goods. He points out that by Order dated 10th January, 1992 it was held as follows :-

"After hearing the Counsel for the parties, it is not possible for this Court to specify as to what consequential action the Board of Trustees for the Port of Calcutta is

entitled to take in view of non-furnishing of the Bank Guarantee by the writ petitioner/respondents. That course of action has to be decided by the appellant itself. However, we direct that the appeal shall appear in the list for hearing on 31.1.1992 at the top of the list subject to part-heard"

Mr. Nageshwar Rao submits that now the 1st Respondents could have sold the goods. He submits that it was the duty of the 1st Respondent to have sold the goods so that further demurrage charges are not incurred. Mr. Jaideep Gupta does not deny that such an application was made by the 1st Respondent. He admits that in the Order dated 10th January, 1992 it was held that the 1st Respondent could decide what course of action they should adopt. He submits that as, on 10th January 1992, the Court directed the matter to be listed on 31st January 1992, the 1st Respondent could not have sold the goods. In our view, the 1st Respondent should have sold off the goods at that stage. They are a statutory body. Merely because there is no obligation to sell does not mean that they can allow the goods to lie around. By this time the 1st Respondent well knew that the Appellant was not paying the charges. Now the Court had permitted them to take recourse to such action as was available in law. Sale is contemplated in the Major Port Trusts Act itself. In our view the 1st Respondent should have now sold the goods. Apart from the fact that demurrage charges would have stopped running, valuable godown space would also have become available to them. On facts of this case, we feel that it would be just and proper that the 1st Respondent not be allowed to charge demurrage charges after 10th January, 1992. Mr. Nageshwar Rao next submits that the adjudication proceedings have ended in favour of the Appellant. He submits that under the Order of the learned single Judge the Customs Authorities have to pay the demurrage charges. As against this Ms. Bagchi submits that under the Order of the learned single Judge the Customs Authorities have to pay demurrage only for the period of detention. These are not matters with which we are concerned in this Appeal. This does not form part of the subject matter of the impugned Judgment. We, therefore, express no opinion on this aspect. We clarify that if the Appellant wants clearance of the goods he has to pay all charges of the 1st Respondent till 10th January, 1992. In the event of the Appellant not clearing the goods after paying all charges within 30 days from today the 1st Respondent will be at liberty to take action under Section 62 of the Major Port Trusts Act and also, if permissible in law to do so, to make a claim against the Appellant for recovery of the balance amount due after sale of the goods. The Appeal stands disposed of accordingly. There will be no order as to costs.

..J.
(SYED SHAH MOHAMMED QUADRI)

J.
(S. N. VARIAVA)

February 22, 2002