

CASE NO.:
Appeal (civil) 2681 of 2001

PETITIONER:
SHIPPING CORPN. OF INDIA LTD.

Vs.

RESPONDENT:
C.L. JAIN WOOLEN MILLS & ORS.

DATE OF JUDGMENT: 10/04/2001

BENCH:
G.B. Pattanaik S.N. Phukan & B.N. Agrawal

JUDGMENT:

WITH
Civil Appeal Nos. 2682-2684 of 2001.
(@ S.L.P.(c) Nos. 5001, 9021/99 and SLP (c) No. 3063/2001
respectively)

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JUDGMENT

PATTANAIAK, J.

Leave Granted.

In this batch of appeals, a common question of law having arisen, they were heard together and are being disposed of by this common judgment. The question for consideration is whether the appellant, who under the terms of the contract between him and the owner of the goods, having a lien over the goods, until the dues are paid can be forced to release the goods, without charging any demurrage, merely because the customs authorities issued a detention order for a specified period? We would discuss the question in relation to the facts in the case between the Shipping Corporation of India vs. C.L. Jain Woolen Mills. The respondent C.L. Jain Woolen Mills, imported the consignment of polyester filament yarn from Korea to India. The port of load was Busan in Korea and the port of discharge was Bombay in India, but the place of delivery of goods was ICD, Delhi. The goods thus being brought to the port of Bombay were discharged but there had been no customs clearance at Bombay and the sealed container was transhipped to ICD, Delhi, where it remained with the Container Corporation of India. The Shipping Corporation of India is engaged in the business of carriage of goods. On the terms and conditions contained in the Bill of Lading, in respect of the goods consigned to it, the corporation claims that the goods cannot be released unless demurrage charges are paid. After the goods arrived in Delhi and remained in the custody of the appellant, the customs authorities being of the opinion that import of polyester filament yarn weighing 5,376 kgs. was unauthorised and directed confiscation of the same, valued at Rs.11.5 lakhs under Section 111(d) of the Customs Act, 1962. The said customs authorities however

permitted the owner to redeem the goods on payment of Rs. 7 lakhs. That apart, a penalty of Rs. 1 lakh was also levied under Section 112(a) of the Customs Act. The owner of the goods assailed the order before the Customs, Excise & Gold (Control) Appellate Tribunal [for short CEGAT]. The tribunal instead of deciding the objections raised by the owner to the validity of the order of the Additional Collector of Customs, ordered that the advance licence and DEEC Book be amended and adjourned the appeal for a period of three months. The owner, therefore, approached the Delhi High Court by filing a writ petition, which was registered as Writ Petition No. 1604/91, praying quashing of the order of the customs authorities, confiscating the goods and imposing the penalty and that of the Import Trade Control Authority enhancing the export obligation from 14,497.5 kgs. to 22,330 kgs. of polyester fabric. It was the contention of the owner before the High Court that in accordance with the export policy and the Duty Exemption Scheme, raw materials could be cleared for home consumption without payment of import duty. To avail of the facility, the importer is required to apply for grant of licence called the Advance Licence and on the basis of the same, raw materials could be imported without payment of any duty. According to the owner, under the licence, thus issued by the Controller of Imports and Exports, entitling import of raw materials without payment of duty, the customs authorities committed error in proceeding with the confiscation proceedings and ordering confiscation as well as levying penalty. The customs authorities as well as the Controller of Imports and Exports had been arrayed as party respondents in the writ petition. Both of them as well as Union of India resisted the claim of the owner, who had imported the goods in question. The High Court disposed of the writ petition by judgment dated 9th September, 1994, quashing the order of the Additional Collector of Customs dated 10th August, 1990 as well as the order of the Customs Excise and Gold (Control) Appellate Tribunal dated 21st March, 1991 and directed the Collector of Customs to release the goods forthwith. The High Court also further held that since the action of the customs authorities is illegal, the goods in question will have to be released to the owner without payment of any detention or demurrage charges by the owner. Needless to mention, the Shipping Corporation of India, the appellant in the present appeal, who was the carrier and who under the Bills of Lading had a lien over the goods, until the dues are paid had not been made a party to the aforesaid writ petition. At this stage it may also be noticed that during pendency of the writ petition in the High Court, an interim order had been passed, entitling the owner to take release of the goods on payment of Rs. 5 lakhs to the customs authorities and a bank guarantee of Rs. 5 lakhs but the owner had not taken advantage of the said interim order and the goods continued to remain in the custody of the present appellant and demurrage charges went on accruing. The order of Delhi High Court was assailed in this Court by filing a Special Leave Petition by the Customs Authorities but that Special Leave Petition however stood dismissed on 13.11.95 in SLP No. 5671/95. The owner of the goods having failed in his attempt to get the goods released, notwithstanding the orders of the High Court in CWP No. 1604/91, filed an application for initiating a contempt proceeding, which was registered as CCP No. 120/95. The High Court however came to hold that the authorities cannot be held to be guilty of disobeying the orders of the Court and accordingly, dismissed the contempt

petition. While dismissing the contempt petition, the learned Judge, granted liberty to the owner to move the Division Bench of the High Court for appropriate directions regarding payment of demurrage/detention charges. Pursuant to the aforesaid observations in the contempt proceedings, an application being filed by the owner, the same was registered as CM 4829/96. That application was disposed of by the Division Bench of Delhi High Court by order dated 18th January, 1999. The Division Bench, while disposing of the petition, came to hold that the entitlement of the carrier of the goods to charge demurrage charges and if so, whether the customs authorities would be liable to pay the same or not is not required to be answered and is a matter, which should be sorted out between those two corporations and the customs authorities. But so far as the owner of the goods are concerned, he having been absolved of any liability to pay the demurrage charges by virtue of the judgment of Delhi High Court dated 9.9.94 in CWP No. 1604/91, he would be entitled to get the goods released without payment of the detention and demurrage charges. The High Court, therefore called upon the customs department as well as the two corporations, who are the carriers to sort out the matter within a specified period and further held that if any detention or demurrages charges are payable, the same shall be paid by the customs department within three weeks. It further directed the carrier of the goods, including the appellant to release the goods after the customs department pays the detention/demurrage charges. Notwithstanding the aforesaid order, the goods not being released, when a fresh contempt petition was filed, registered as CCP No. 89/99, the High Court issued notice on 25.2.99, calling upon the alleged contemnor to file their reply by 11th March, 1999. Against the initiation of the aforesaid contempt proceeding, the Shipping Corporation of India filed SLP No. 3391/99. The order dated 18.1.99 was also assailed by the Shipping Corporation, which was registered as SLP No. 5001/99. The container Corporation of India filed a special leave petition on identical circumstances and raising identical question, which is SLP No. 9021/99. The Union of India also assails the order dated 18.1.99 by filing Special Leave Petition No. 3063/2001 along with the application for condonation of delay. This batch of cases were listed before a Bench of two learned Judges on 11th February, 2001 and after hearing the matters for sometime, the Bench felt that there appears to be some inconsistency between the decision of this Court in Union of India vs. Sanjeev Woolen Mills, 1998(9) SCC 647 and the Grand Slam Internationals case reported in 1995(3) SCC 151 and as such observed that the cases should be placed before a Three Judge Bench and that is how, this batch of cases are before this three Judge Bench. When these appeals by grant of special leave were placed before the Three Judge Bench on 1st March, 2001, we had directed the goods be released to the owner without any conditions but such release will be subject to the ultimate decision in these appeals.

The stand of the carriers in this Court is that in view of the provisions of the Bills of Lading Act as well as the terms and conditions under which the goods have been imported the corporation-carrier retains a lien over the goods until all the dues including the demurrage charges are paid and the order of the Delhi High Court in the writ

petition to which these carriers were not parties, will not obliterate that right. The further contention of these corporations is that the order of the High Court dated 18.1.99 without determining the rights of the carrier and directing to sort out the matter with the customs authorities is unsustainable and as such the same should be set aside. The stand of the customs authorities and the Union of India on the other hand is that the customs authorities cannot be required to pay the demurrage charges merely because the action of the customs authorities in detaining the goods was found to be illegal by the Court of law. According to the Union of India in such a case when a detention certificate is issued by the customs authorities, the carrier of goods will not be entitled to claim any demurrage charges notwithstanding the terms and conditions of the contract under which the goods had been carried and on this score, the order of the High Court dated 18.1.99 is erroneous. The contention of the importer of the goods on the other hand is that in view of the findings of the High Court in CWP No. 1604/91, specifically holding that the goods in questions be released without payment of demurrage or detention charges and the further finding to the effect that the order of the customs authorities in confiscating and levying penalty is illegal and invalid, the importer cannot be made liable to pay the demurrage and detention charges. It is the further submission of the importer that notwithstanding the clear directions of the High Court, non-release of goods was a gross violation of the Courts order and, therefore, the appropriate authorities should be suitably dealt with.

In view of the submissions made at the Bar appearing for different parties, referred to earlier, the first question that arises for consideration is whether in the case in hand, the importer of the goods can be made liable to pay any demurrage/detention charges? It is undisputed that under the terms and conditions of Bills of Lading, the carrier had a lien over the goods until all the dues are paid and the goods having been kept, not being released, the corporation-carrier was entitled to charge demurrage charges. But in view of the specific directions of the Delhi High Court in the writ petition filed by the importer of the goods, challenging the legality of the order of the customs authorities in confiscating the goods and levying penalty and that order having reached finality by dismissal of the special leave petition against the same filed by the Union of India, the liability of the importer to pay the demurrage charges ceases and that question cannot be re-opened.

The next question that arises for consideration which is a larger issue, namely if the customs authorities do not release the goods and initiates proceedings and finally passes order of confiscation but that order is ultimately set aside in appeal and it is held by Court of law that the detention of the goods was illegal, then in such circumstances whether the carrier of the goods who had lien over the goods for non-payment of duty, can enforce the terms and conditions of the contract against the customs authorities, making the said authorities liable to pay the demurrage charges. Needless to mention, demurrage charges are levied for the place the goods occupy and for the period it remains not being released, on account of lack of customs clearance. It may be noticed at this stage that the customs

authorities exercise its power under the provisions of the Customs Act whereas the claim of the Corporation who acts as a carrier is based upon the terms and conditions of the contract between the importer and the carrier. So far as the powers of the customs authorities are concerned, the same are circumscribed by the provisions of the Customs Act, 1962. Section 8 of the Customs Act empowers the Collector of Customs to approve proper places in any customs port or customs airport or coastal port for unloading and loading of goods and specify the limits of the customs area. Section 33 prohibits unloading of imported goods at any place other than the place approved under Section 8(a) of the Act. Section 34 provides that the imported goods shall not be unloaded from any conveyance except under the supervision of the proper officer. Section 45 provides for clearance of imported goods. The same provision may be extracted herein below in extenso:

Sec.45 Restrictions on custody and removal of imported goods:

(1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the [Commissioner of Customs] until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force (a) shall keep a record of such goods and send a copy thereof to the proper officer; (b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.

Under the aforesaid provision, the imported goods would remain in the custody of the person approved by the Customs Commissioner, until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII. Section 47 of the Act is the provision to obtain clearance of goods for home consumption. Section 49 provides for storage of imported goods in public warehouse, or in a private warehouse, if permitted by the Deputy Commissioner of Customs or Assistant Commissioner of Customs. Under Chapter IX of the Act, the Deputy Commissioner or Assistant Commissioner of Customs may appoint public warehouses wherein dutiable goods may be deposited, as provided in Section 57 of the Act. Under Section 58, the Deputy Commissioner or Assistant Commissioner may even license private warehouses wherein dutiable imported goods could be deposited. But all

warehoused goods would be subject to the control of the proper officer of the customs department, as provided in Section 62 and the owner of the goods is required to pay the rent and warehouse charges to be fixed by the Commissioner of Customs, as provided in Section 63. No warehoused goods could be taken out of the warehouse except for clearance of home consumption or for removal to another warehouse, as stipulated in Section 67 of the Act. Section 68 provides the procedure which an importer would follow for clearing the warehoused goods for home consumption. The expression warehouse has been defined in Section 2(43) to mean a public warehouse appointed under Section 57 or a private warehouse licensed under Section 58. It is thus apparent from different provisions mentioned above that the customs authorities have full power and control over the imported goods and without the permission of the customs authorities, the goods cannot be cleared. But at the same time, there is no provision in the Customs Act, conferring power on the Customs Authorities to prohibit or injunct any other authority where the imported goods are stored from charging the demurrage charges for the services rendered for storing the imported goods. We are not concerned in the present case with the provisions of either the Major Ports Trust Act or International Airport Authorities Act, as the imported goods had not been stored either in any Major Port or in the international air cargo. It may however be necessary to examine some of the provisions of the Bills of Lading Act as well as the Contract Act, since the claim of both, the Shipping Corporation and Container Corporation, charging demurrage for the space occupied for the goods, not being released, is on account of the contract between them. Under the Indian Bills of Lading Act, 1956, every consignee of goods, named in a Bill of Lading and every endorsee of a Bill of Lading, is vested with absolute right over the goods. The Bill of Lading is a well known mercantile document of title, which is transferred in the business world by endorsement passing to the endorsee, the title of the goods covered by such Bill of Lading. Clause (18) provides for payment of demurrage charges in case of non-clearance of goods within the free time available. The said clause is extracted herein below in extenso:

Clause 18 Delivery of goods in Container: If receipt of goods in container(s) is not taken by the merchant within 48 hours after discharge from the vessel (or after the arrival of the goods at place of delivery if named herein) the carrier shall be at liberty at his discretion either to unpack the container(s) and to put the goods in safe on behalf of the merchant and at the merchants risk and expense or to charge demurrage in accordance with the carriers tariff applicable to the route over which the goods are carried. If unpacking the goods of container(s) is required for whatever reason and the contents cannot be identified as to the marks and numbers, cargo sweepings liquid residue and any unclaimed contents not otherwise accounted for shall be allocated for completing delivery to the merchant. The carrier shall not be required to separate or deliver goods in accordance with the brand, marks, numbers, size or types of packages as stated by the merchant in his particulars but only to deliver total number of containers (if same loaded by the merchant or packages or units) (if container(s) loaded by the carrier) shown on the face of this Bill of Lading.

Clause (2) of the Bill of Lading defines Carriers Tariff as follows:

Clause (2)- Carriers Tariff:

The terms of the carriers applicable tariff are incorporated herein and copies of the relevant provisions of the applicable tariff are obtainable from the carrier or the agents upon request. In the case of inconsistency between this Bill of Lading and the applicable tariff, this Bill of Lading shall prevail.

Clause (14) confers a lien on the goods for all sums payable under the contract. The said clause is quoted below in extenso:

Clause (14). FREIGHT ETC. EARNED

.....All unpaid charges shall be paid in full and without any offset, counterclaim or deduction. Any error in freight or other charges or in the classification of Goods is subject to correction and if on correction the freight or charges are higher the Carrier may collect the additional amount from shipper or consignees. The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under the contract (including without limitation unpaid freight and dead freight upon any portion of the Goods covered by the Shipping Order granted in respect hereof which may not have been shipped) and the General Average contribution to whomsoever due and for the cost of recovering the same and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant. The Merchant shall indemnify the Carrier against all and any costs incurred by the Carrier in exercising his rights under this clause.

The expression Carrier under the definition clause in the Bill of Lading means the Shipping Corporation of India Limited and/or associated company on whose behalf the Bill of Lading has been signed.

The two provisions of the Contract Act, on which Mr. Dave, appearing for the appellant, strongly relied upon, may now be noticed. Section 170 is the right of lien of the bailee for the services rendered in respect of the goods and the bailee has right to retain the goods until he receives due remuneration for the services he has rendered. Section 171 is the General lien of bankers, factors, wharfingers, attorneys and policy brokers, who also retain as a security, the goods bailed to them. The contention of Mr. Dave, for the appellant is the right of the appellant to claim demurrage charges in respect of the goods, which is in his custody, the said goods not being released, within a specified period, flows from the terms and conditions of the contract between the importer and the corporation and that right cannot be taken away by issuance of a detention certificate by the Customs authorities under the provisions of the Customs Act and as such even if a Court directs that the importer is not liable to pay the demurrage charges, because of the illegal detention of the goods by the customs authorities, the appellant would not be bound by the same,

particularly, when the appellant was not a party to the proceedings between the customs authorities and the importer. Learned Additional Solicitor General, Mr. Mukul Rohtagi however, on the other hand contends that Section 45(2)(b) of the Customs Act prohibits release of imported goods from the customs area, except in accordance with the permission in writing of the proper officer. The expression otherwise dealt with in the aforesaid provision is also a restriction placed on the custodian and that is a complete embargo for the goods being released. The prohibition in question is in relation to removal of goods as well as dealing with the goods in any manner. This being the manner of restrictions imposed for removal of the goods and at the same time, conferring power on the customs authorities, if after initiation of adjudication proceedings, a Court of law nullifies the same and the customs authorities then issues a detention certificate, then the importer would not be liable for paying any demurrage charges, notwithstanding the contract between the importer and the appellant, and at any rate, the customs authorities cannot be fastened with the liability of paying the demurrage charges. In this view of the matter, the order of the Delhi High Court dated 18.1.99 must be held to be erroneous. The rival contentions require careful examination of the different provisions of the Customs Act, the Contract Act as well as the Bills of lading.

Before examining the correctness of the rival submissions, one thing is crystal clear that the relationship between the importer and the carrier of goods in whose favour the Bill of lading has been consigned and who has stored the goods in his custody, the relationship is governed by the contract between the parties. Section 170 of the Indian Contract Act engraft the principle of Bailees lien, namely if somebody has received the articles on being delivered to him and is required to store the same until cleared for which he might have borne the expenses, he has a right to detain it until his dues are paid. But it is not necessary in the case in hand to examine the common law principle and the bailees lien inasmuch as the very terms of the contract and the provisions of the Bills of Lading,, unequivocally conferred power on the appellant to retain the goods, until the dues are paid. Such rights accruing in favour of the appellant cannot be nullified by issuance of a certificate of detention by the customs authorities unless for such issuance of detention certificate any provisions of the Customs Act authorises. We had not been shown any provisions of the Customs Act, which would enable the customs authorities to compel the carrier, not to charge demurrage charges, the moment a detention certificate is issued. It may be undoubtedly true that the customs authorities might have bona fide initiated the proceedings for confiscation of the goods which however, ultimately turned out to be unsuccessful and the Court held the same to be illegal. But that by itself, would not clothe the customs authorities with the power to direct the carrier who continues to retain a lien over the imported goods, so long as his dues are not paid, not to charge any demurrage charges nor the so- called issuance of detention certificate would also prohibit the carrier from raising any demand towards demurrage charges, for the occupation of the imported goods of the space, which the proprietor of the space is entitled to charge from the importer. The importer also will not be entitled to remove his goods from the

premises unless customs clearance is given. But that would not mean that demurrage charges could not be levied on importer for the space his goods have occupied, since the contract between the importer and the proprietor of the space is in no way altered because of the orders issued by the customs authorities. The learned Additional Solicitor General, vehemently argued and pressed sub-section 2(b) of Section 45 in support of his contention that the imported goods have to be dealt with in accordance with the permission in writing of the proper officer of the customs department and in exercise of such power when customs authorities initiate adjudication proceeding and ultimately confiscate and levy penalty, when such order is struck down and a detention certificate is issued, the said issuance of detention certificate would come within the expression otherwise dealt with used in Section 45(2)(b), and therefore, the proprietor of the space would be bound not to charge any demurrage charges. We are unable to accept this contention inasmuch as the expression otherwise dealt with used in Section 45(2)(b), in the context in which it has been used, cannot be construed to mean, it authorises the customs officer to issue a detention certificate in respect of the imported goods, which would absolve the importer from paying the demurrage charges and which would prevent the proprietor of the space from levying any demurrage charges. Having scrutinized the provisions of the Customs Act, we are unable to find out any provision which can be remotely construed to have conferred power on the customs authorities to prevent the proprietor of the space from levying the demurrage charges and, thereby absolving the importer of the goods from payment of the same. In fact the majority decision in Grand Slam Internationals case, 1995(3) SCC 151, clearly comes to the aforesaid conclusion with which we respectfully agree.

We have also examined the decision of this Court in Union of India vs. Sanjeev Woolen Mills, 1998(9) SCC 647 and we do not find any apparent inconsistency between the decision of this Court in Grand Slam and that of the Sanjeev Woolen Mills. In Sanjeev Woolen Mills, the imported goods were synthetic waste (soft quality), though the customs authorities detained the same, being of the opinion that they were prime fibre of higher value and not soft waste. On account of non-release, the imported goods incurred heavy demurrage charges but the customs authorities themselves gave an undertaking before the High Court that in the event the goods are found to be synthetic waste, then the Revenue itself would bear the entire demurrage and container charges. Further the Chief Commissioner of Customs, later had ordered unconditional release of goods and yet the goods had not been released. It is under these circumstances and in view of the specific undertaking given by the customs authorities, this Court held that from the date of detention of the goods till the customs authorities intimated the importer, the importer would not be required to pay the demurrage charges. But in that case even subsequent to the orders of the customs authorities on a suit being filed by one of the partners of the importer-firm, an order of injunction was issued and, therefore it was held that for that period, the importer would be liable for paying the demurrage and container charges. The judgment of this Court in Sanjeev Woolen Mills, therefore, was in relation to the peculiar facts and circumstances of the case and the Court had clearly observed that the order in question is meant to do justice to the importer, looking to the totality of the

circumstances and the conduct of customs authorities. Thus, we see no inconsistency between the ratio in Sanjeev Wollen Mills and the Judgment of this Court in Grand Slam. That apart, the judgment in Grnd Slam was a three judge bench judgment. In the case in hand, as has already been stated earlier, the earlier judgment of Delhi High Court dated 9.9.94 in C.W.P. No. 1604/91, has become final, which entitles the importer to get the goods released without payment of the detention and demurrage charges. In the contextual facts, notwithstanding the judgment of the High Court, the goods not having been released, the impugned order and direction dated 18.1.99, cannot be held to be infirm in any manner. In the absence of any provision in the Customs Act, entitling the customs officer to prohibit the owner of the space, where the imported goods have been stored from levying the demurrage charges, levy of demurrage charges for non-release of the goods is in accordance with the terms and conditions of the contract and as such would be a valid levy. The conclusion of the High Court to the effect that the detention of the goods by the customs authorities was illegal and such illegal detention prevented the importer from releasing the goods, the customs authorities would be bound to bear the demurrage charges in the absence of any provision in the Customs Act, absolving the customs authorities from that liability. Section 45(2)(b) of the Customs Act cannot be construed to have clothed the customs authorities with the necessary powers, so as to absolve them of the liability of paying the demurrage charges. In the aforesaid premises, we see no infirmity with the directions given by the Delhi High Court on 18.1.99. The goods in question, having already been directed to be released, without the payment of the demurrage charges, the importer must have got the goods released. Having regard to the fact situation of the present case, it would be meet and proper for us to direct the Shipping Corporation and Container Corporation, if an application is filed by the customs authorities to waive the demurrage charges. The appeal is disposed of accordingly.

JUDIS