

BOARD OF TRUSTEE OF THE PORT OF BOMBAY

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v.

INDIAN GOODS SUPPLYING CO.

March 21, 1977

[M. H. BEG, C.J., A. C. GUPTA AND P. S. KAILASAM, JJ.]

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Demurrage—Demurrage claimed as per the scale framed under s. 43A of the Bombay Port Trust Act (Act 6 of 1879) and approved by the Central Government—Whether the claim of demurrage by the Port Trust for the period during which the goods were detained with it in respect of Import Trade Control formalities is maintainable—Whether the D.O. letter dated 7-9-1952 from the Central Government to the Port Trust, a direction under s. 43B (1A) of the Act.

The appellant, a statutory body framed the scales of rates of demurrage of goods under section 43 (a) of the Bombay Port Trust Act 1879 which was sanctioned by the Central Government. Later on the Central Government in its D.O. letter dated 7th September 1952 addressed to the appellant expressed its view that it seems unreasonable to charge an importer any demurrage once it is accepted that clearance was delayed on account of the reasons beyond his control. It also expressed its hope that the appellant would reconsider its decision and fall in line with the practice of the Calcutta and Madras Ports. The Port considered this letter and after taking into consideration the several circumstances suggested that demurrage may be levied on a graded scale and the Central Government did not take any further action. In fact, the appellant has prescribed reduced demurrage levy from the expiry of the free days.

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In respect of the three consignments of Chinese newsprint imported by the respondent for home consumption in India, the appellant claimed demurrage for the period from March 25, 1957 and as the amount was not paid the goods were sold in public auction. The respondent thereafter filed a suit for recovery of a sum of Rs. 24,950/- and interest thereon from the appellant being the aggregate loss sustained by it. The appellant denied that liability and pleaded that it was, in law, entitled to collect the demurrage levied on the respondent and as it failed to pay the demurrage, the appellant was entitled to sell the goods by auction. The City Civil Court, Bombay decreed the suit with interest at 6 per cent per annum from the date of the suit till judgment and thereafter at 4 per cent per annum and costs of the suit. The appeal preferred by the appellant to the High Court failed and the decree stood confirmed. The decretal amount deposited in the High Court during the pendency of the appeal was withdrawn by the respondent.

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Allowing the appeal by special leave the Court,

HELD : (1) The High Court was in error in holding that the importer of the goods cannot be held responsible for any delay not attributable to his own default and that demurrage under s. 43(a) could never be imposed as long as the goods were detained for the purpose of the operation of the Import Trade Control regulations. [350 E]

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(2) The D.O. letter addressed by the Government of India should not be construed as a direction calling upon the Board to modify any portion of the scale framed by the Port Trust. The language of the D.O. would indicate that the Government wanted the Port Trust to consider the Government's proposal and nothing further. The Port Trust considered the proposal and made its report. Section 43B(1A) has no application to this case. [346 F-H]

(3) It is no doubt true that before clearance is given by the Import Trade Control Authorities and the Customs Authorities, the goods cannot be cleared by the importer. Neither can the Port Trust deliver the goods without the consent of the Import Trade Control Authorities. Taking into account the hardship caused to the importer because of the delay certain concessions in demurrage rates are permitted. As the scales of rates are permitted by virtue of the statutory

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- A powers conferred on the Board under s. 43 and as the rates have been approved by the Central Government under s. 43B, the rates have the force of law and cannot be questioned. Taking into account the hardship to the importers certain concession has been given but the legality of the rate which are being levied according to law cannot also be questioned. [347 C-D; E-F]

Trustees of the Port of Madras v. M/s Aminchand Pyarelal & Ors. [1976] 1 SCR 721, followed.

- B (4) Even though the delay in clearing the goods was not due to the negligence of the importer for which he should be held responsible yet he cannot avoid the payment of demurrage as the rates imposed are under the authority of law, the validity of which cannot be questioned. In the instant case the claim of the appellant cannot be resisted as there is no evidence that the delay was due to any act of the Port Trust or persons for whom the Port Trust is responsible. [349 G-H]

- C *Aktieselskabet Reidar v. Arcos, Limited* [1927] 1 K. B. 352; *Budgett & Co. v. Bippington & Co.* [1891] 1 Q. B. p. 35 and *Compania Crystal De Vapores of Panama v. Herman & Mohatta (India) Ltd.* [1953] 2 All. E. R. 508, quoted with approval.

(5) Section 43, 43A and 43B of the Bombay Port Trust Act 1891 which make reference to "free days" are intended only to omit Sundays, other holidays or on which the assessment of customs duty cannot be taken up and would not include the entire period during which the Import Trade Control formalities have not been completed. [350 C-D]

- D (6) Under the powers vested in the Board, it is its statutory duty to collect the rates, to have a lien on the goods and seize and detain the goods until such rates are fully paid. The Board is empowered to sell the goods if rates are not paid or lien for freight is not discharged or when the goods are not removed from its premises within the limited time. [347 A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1353 of 1975.

- E (Appeal by Special Leave from the Judgment and Order dated 1-11-1974 of the Bombay High Court in Appeal No. 493 of 1966 from original Decree.)

F. S. Nariman, B. R. Zaiawala, B. S. Bisaria, J. B. Dadachanji, O. C. Mathur, K. J. John and Shri Narain, for the appellants.

- F *P. H. Parekh and Miss Manju Jetely*, for the respondent.

The Judgment of the Court was delivered by

- G KAILASAM, J.—This appeal by special leave is preferred by the Board of Trustees of the Port of Bombay against the judgment of the Bench of the Bombay High Court in first appeal confirming the decree passed by the City Civil Court and dismissing the appeal with costs. The respondents, Indian Goods Supplying Co., a partnership firm in Bombay, filed suit No. 3304 of 1959 in the Bombay City Civil Court at Bombay praying for a decree against the Trustees of the Port of Bombay in the sum of Rs. 24,950 with interest.

- H Three consignments of Chinese newsprint were imported by the respondents for home consumption in India. The first 2 consignments arrived on February 16, 1957. Suffice it to say that the clearance of the two consignments as well as the third consignment

was considerably delayed and the Port Trust claimed demurrage for the period from March 25, 1957. The respondents disputed the right of the Port Trust to charge any demurrage for the period during which the goods were detained by the Customs authorities for analytical test as well as for the Import Trade Control formalities. It is common ground that so far as the period for analytical test certified by the Customs authorities is concerned the Port Trust cannot charge demurrage. But so far as the period during which the goods were detained for the Import Trade Control formalities by the Customs authorities the Port Trust claimed demurrage. Due to protracted correspondence between the parties the goods were not cleared and ultimately the suit was filed by the respondents for recovery of a sum of Rs. 24,950 and interest thereon from the Port Trust being the aggregate loss sustained by them. The appellants denied that liability and pleaded that the Port Trust was in law entitled to collect the demurrage levied on the respondents and that as they failed to pay the demurrage the Port Trust was entitled to sell the goods by public auction.

The City Civil Court, Bombay, decreed the suit for a sum of Rs. 24,950 with interest at the rate of 6 per cent per annum from the date of the suit till judgment and thereafter at 4 per cent per annum and costs of the suit.

The appellants preferred an appeal to a Division Bench of the Bombay High Court which dismissed the appeal and confirmed the decree passed by the City Civil Court.

When the appeal was pending before the High Court the appellants deposited the decretal amount in court which was withdrawn by the respondents. Mr. Nariman, counsel for the Port Trust, stated that the Port Trust does not want to ask for the repayment of the money and that he will confine himself to the question of the correctness of the decision of the Bombay High Court holding that the Port Trust is not entitled to collect demurrage in the circumstances of this case. It is therefore sufficient for the purposes of the appeal to confine ourselves to determining the question of law which has been raised before the High Court and decided by it.

The question that was raised before the High Court was whether the claim of demurrage by the Port Trust for the period during which the goods were detained with the Port Trust in respect of Import Trade Control formalities is maintainable. The High Court held that the importer of the goods cannot be held responsible for any delay not attributed to his own default and that the importer whose goods are detained by the Customs Department is entitled to claim the clearance of goods without demurrage during the period for which the Customs Department has detained them.

The appellants, the Board of Trustees of the Port of Bombay, is a statutory body constituted by the Bombay Port Trust Act, Act 6 of 1879, and is a body corporate. Chapter VI of the Act relates to Revenue and Expenditure and provides for levy of rates. Section

- A 43 empowers the Board to frame a scale of tolls, dues, rents, rates and charges to be levied for each or any of the matters enumerated in clauses (a) to (d). Sub-section (a) enables framing of scale of rates relating to the landing, shipping, wharfage, crantage, storage or demurrage of goods. We are concerned with the framing of the scale of rates for demurrage of goods. Section 43B(1) requires that every scale framed by the Board shall be submitted to the Central Government for sanction and, when so sanctioned and published in the Bombay Government Gazette, shall have the force of law; and subject to the like sanction and publication, may from time to time be amended or added to by the Board. It is admitted that the Board framed a scale of rights for demurrage of goods and the scale so framed by the Board was submitted to the Central Government and was sanctioned by the Central Government and published by the Bombay Government in the Gazette as required. The result is that under section 43B(1) the scales so framed by the Board and approved by the Central Government shall have the force of law.

- D The learned counsel for the appellants as the Port Trust in this appeal have given up its claims to refund of the money taken by the respondents. In view of this the counsel for the respondents confined his arguments to supporting the view taken by the High Court regarding the question of law. He submitted that the Central Government had taken action under section 43B (1A) and had called upon the Board to modify the operation of such scales and therefore the Board was bound to modify the scales accordingly. This contention is based on a D. O. letter dated 7th September, 1952 addressed by the Government of India to the Port Trust which is typed at page 350 of the Supplement Paper Book No. 2. In the D. O. letter the Government expressed its view that it seems unreasonable to charge an importer any demurrage once it is accepted that clearance was delayed on account of the reasons beyond his control. The letter concluded by expressing an earnest hope that the Bombay Port Trust will reconsider their decision and fall in line with the practice of the Calcutta and Madras Ports. It concluded by stating "We shall be grateful if you will kindly place the matter before the Trustees for their favourable consideration and intimate to us the result." The Board considered this letter and after taking into consideration the several circumstances, suggested that demurrage may be levied on a graded scale. The Government of India was informed of the Resolution of the Board and no further action was taken by the Government.
- E F G H The D. O. letter addressed by the Government of India cannot be considered as a direction by the Central Government calling upon the Board to modify any portion of the scale framed by the Port Trust. The language of the D. O. would indicate that the Government wanted the Port Trust to consider the Government's proposal and nothing further. The Port Trust considered the proposal and made its report. We are unable to accept the plea of the learned counsel for the respondents that the D. O. letter should be construed as a direction calling upon the Board to modify the portion of the scale framed by the Board. Section 43B(1A) has therefore no application to this case.

Chapter VII of the Port Trust Act enumerates the powers and functions of the Board. It is the duty of the Board to recover the rates to have a lien on the goods and seize and detain the goods until such rates are fully paid. The Board is empowered to sell the goods if rates are not paid or lien for freight is not discharged. It can also dispose of goods not removed from the premises of the Board within the time limited. Section 65 also provides the mode of application of proceeds of the sale. Under section 66 the Board is entitled to distrain for non-payment of rates. The Port clearance shall not be granted till the rates are paid. It is thus a statutory duty of the Board to collect the rates prescribed.

The contention put forward on behalf of the respondents is that they are in no way responsible for the delay in clearing the goods as the goods had been detained under the Import Trade Control Regulations. It is no doubt true that before clearance is given by the Import Trade Control authorities and the Customs Department the goods cannot be cleared by the respondents. Neither can the Port Trust deliver the goods without the consent of the Import Trade Control authorities. Taking into account the hardship caused to the importer because of the delay certain concessions in demurrage rates are permitted. The Port Trust has prescribed the reduced demurrage levy which is 1/6th of the normal rate from the date of expiry of the free days upto the 60th day, 1/3rd of the normal rate after the expiry of the 60th day, upto the 90th day, half the normal rate after the expiry of the 90th day upto the 120th day, 2/3rd of the normal rate after the expiry of the 120th day upto the 150th day and at the full rate after the expiry of the 150th day. As the scale of rates are framed by virtue of the statutory powers conferred on the Board under section 43 and as the rates have been approved by the Central Government under section 43B the rates have the force of law and cannot be questioned. Taking into account the hardship to the importers certain concession has been given but the legality of the rates which are being levied according to law cannot be questioned. This view was taken by this Court in a recent decision reported in *Trustees of the Port of Madras v. M/s. Aminchand Pyarelal & Ors.* (1) Where it had to consider the validity of the scale of rates fixed by the Madras Port Trust. In a suit by the Port Trust against the importer and the Union of India and the Customs authorities to recover the balance of demurrage amounting to about rupees three lakhs the question arose whether the scale of charges in the Port Trust Regulations under the heading "Demurrage" was void and *ultra vires* for the reason that it was unreasonable and not within the authority of the Port Trust. The relevant provisions of the Bombay Port Trust Act with which we are concerned are in pari materia with the provisions of the Madras Act which fell for consideration by the Supreme Court. The Supreme Court held that the scale of rates and statement of conditions framed by the Madras Port Trust under sections 42, 43 and 43A are not by-laws

(1) [1976] 1 S.C.R. 721.

A and the sections confer authority on the Board to frame a scale of rates at which and a statement or conditions under which any of the services specified therein shall be performed. It observed "The Board's power to frame a scale of rates and statement of conditions is not a regulatory power to order that something must be done or something may not be done. The rates and conditions govern the basis on which the Board performs the services mentioned in sections B 42, 43 and 43-A. Those who desire to avail of the services of the Board are liable to pay for those services at prescribed rates and to perform the conditions framed in that behalf by the Board." The Court rejected the view of the High Court that demurrage being a charge for wilful failure to remove the goods within the free period can be levied only if the failure to remove the goods is due to the fault or negligence of the importer or his agent. It also did not agree C with the view taken by the High Court that the authority given to the Board to frame the scale of rates can be exercised only for the purpose of levying charges where the importer was not prevented by any lawful authority from clearing the goods from the transit area and he had defaulted or was negligent in clearing the goods. Justice Chandrachud, who spoke for the Court, observed in his judgment at D page 736 *supra* that the statute had not placed any limitation on the power of the Board to fix rates and as the Board had the power to frame a scale of rates at which and the statement of conditions under which any of the services specified in the section shall be performed and as the Board has fixed the scale of rates it was difficult to see in what manner or respect the Board has exceeded its power under section 42. The Court proceeded to observe in rejecting the view of the High Court that the Board cannot fix rates of demurrage E when the failure to remove was not due to some fault or negligence of the importer, that there is no such fetter on the Board's powers to fix the rates. This decision of the Supreme Court is on all fours with the facts of the present case and concludes the question.

F Mr. Nariman, counsel for the appellants cited three decisions of the English Courts in support of his contention that even on the basis of a contract the right of the Port Trust to recover demurrage cannot be denied unless the person claiming the demurrage is responsible for the delay. In *Aktieselskabet Reidar v. Arcos, Limited* ⁽¹⁾, Lord Justice Atkin in answering the question whether if the charterer has failed to complete the loading of the ship within the lay days, and the ship during the demurrage days becomes, without the default of G the shipowner, unable to carry as much cargo as she would have carried if loaded within the lay days, but receives from the charterer a full cargo for her diminished capacity, the loss falls upon the charterer in addition to the demurrage, expressed his opinion that the decision should be for the shipowner. It was held that "The result of the authorities appears to be that in a contract fixing a number of lay days and providing for days at demurrage thereafter, the charterer H enters into a binding obligation to load a complete cargo within the lay days subject to any default by the shipowner or to the operation

(1) [1927] 1 K.B. 352.

of any exceptions, matters which do not arise in this case....
 If however, for reasons other than the shipowner's default, the charterer becomes unable to do that which he contracted to do—namely, put a full and complete cargo on board during the fixed lay-days, the breach is never repaired, the damages are not completely mitigated, and the shipowner may recover the loss that he has incurred in addition to his liquidated demurrage or his unliquidated damages for detention.” Thus it appears clear that claim of demurrage cannot be resisted unless where the detention was due to the shipowner's default. In the present case the Port Trust's claim for demurrage cannot be denied unless it is proved that the delay was due to the Port Trust itself.

In *Budgett & Co. v. Binnington & Co.*, (1) a clause in the charter-party fixed the number of lay-days for unloading and allowed other days for demurrage. During the lay-days a strike took place both among the labourers employed on behalf of the ship and those employed by the consignees, with the result that the unloading ceased, and could not be resumed till some days after the expiration of the lay-days. The Court of Appeal held that as the number of lay-days was fixed the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners, owing to the strike, to do their part in the unloading. The test that was laid down by Lord Esher Master of the Rolls, was. Has the shipowner failed in his duty through any default of his own or of persons for whom he is responsible? As the non-delivery was occasioned by something which the shipowner could not foresee or by the act of persons over whom he had any control it was held that he was not liable.

In *Compania Crystal De Vapores of Panama v. Herman & Mohatta (India) Ltd.*, (2) Justice Devlin quoted with approval the law laid down by Lord Esher in *Budgett Co. v. Binnington & Co.* (supra) which is in the following terms :—

“if the shipowner by any act of his has prevented the discharge, then, ‘though the freighter's contract is broken, he is excused’, he was referring to a case in which the shipowner's act preventing the discharge was in breach of his obligation to give the charterer all facilities for the discharge. But here the act of the shipowner which delayed the discharge was not a breach of any obligation of his.”

The position therefore is that even though the delay in clearing the goods was not due to the negligence of the importer for which he could be held responsible yet he cannot avoid the payment of demurrage as the rates imposed are under the authority of law the validity of which cannot be questioned. The claim cannot be resisted as there is no evidence that the delay was due to any act of the Port Trust or persons for whom the Port Trust is responsible.

(1) [1891] 1 Q.B. p. 35.

(2) [1953] 2 All. E.R. 508.

- One other contention which was raised before the High Court
- A but was not dealt with by it may be referred to. It was submitted on behalf of the respondents that the definition of the words "free days" would not include the period of holidays or part of a holiday or Sunday in computing the number of free days during which the Customs Duty may not be assessed or received and therefore the period of detention of the goods during the operation of Import Trade Control formalities must be considered as free days. In the scale
- B of rates charged at the docks framed by the Bombay Port Trust under sections 43, 43A and 43B of the Bombay Port Trust Act, 1879, in Section III reference is made to free days. Under the heading "Free Days" it is provided that all goods will be allowed storage in Docks free of rent for 5 days. It is further provided that in computing the number of free days Sundays and holidays
- C referred to in by-law 118 as well as any other days on which Customs Duty may not be assessed or received, will be omitted in the case of all goods liable to duty under section 20 of the Sea Customs Act. The submission was that not only Sunday and holidays should be omitted but also other days on which Customs Duty may not be assessed or received will have to be omitted and this should be understood as days during which the Import Trade Control formalities could not be completed. This contention cannot be accepted
- D as these Rules are intended only to omit Sundays, other holidays and days on which the assessment of Customs Duty cannot be taken up and would not include the entire period during which the Import Trade Control formalities have not been completed.

- The High Court was therefore in error in holding that the importer of the goods cannot be held responsible for any delay not
- E attributable to his own default and that demurrage under section 43A could never be imposed as long as the goods were detained for the purpose of the operation of the Import Trade Control Regulations. In the result the appeal is allowed but due to the concession made by the learned counsel for the Port Trust there will be no order directing the refund of the money that had already been deposited by the Port Trust and withdrawn by the respondents. The appellant
- F also does not press his counter claim. There will be no order as to costs in this appeal.

S.R.

Appeal allowed.