M/S. RASIKLAL KANTILAL & CO. A

v.

BOARD OF TRUSTEE OF PORT OF BOMBAY & OTHERS

(Civil Appeal No. 5968 of 2011)

FEBRUARY 28, 2017 B

[J. CHELAMESWAR AND ABHAY MANOHAR SAPRE, JJ.]

Bailment:

Consignments (78 in numbers) shipped on cash against documents basis – Received at Bombay Port – Consignees filed C *bills of entry only in respect of 37 consignments, but failed to lift the consignments – Consignments stored at the Port – Exporter/ Consignor sold the consigned goods to the petitioner – Petitioner applied to Customs Authorities to file Bills of Entry for 41 consignments and to substitute Bills of Entry in respect 37* D *consignments – Customs authority issued detention certificate specifically mentioning that detention was for* "bonafide *operation of ITC formalities" – Notification of "Statement of guidelines for Permission of Demurrage Charges", 1992 whereby in cases where goods/consignments detained by Customs for 'ITC facilities' were to be considered for grant of remission from payment of demurrage* E *for the period the goods were being so processed by Customs Authorities – Levy of demurrage charges giving remission of certain amount from the demurrage charge – Whether the appellant was liable to pay demurrage charges for the period anterior to his acquisition of title to the goods and whether the appellant was* F *entitiled to complete remission of the demurrage charges on account of delayed clearance for the goods by the Customs Department – Held: The right of Board of Trustee to recover its dues (either from the steamer agent or the consignee) flows from s.158 of Contract Act r/w. s.1 of Bills of lading Act and from s.59(1) of the Major Port Trusts Act, 1963 – Enquiry into the title of the goods and the point* G *of time at which the title passes to the consignee is irrelevant for determining the authority of the Board to recover its dues – The question as to who would be liable to pay the dues would depend on the nature of relationship between the consignor and consignee*

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– In the present case, the Board was sub-bailee of the goods bailed by consignor (bailor) to the ship-owner (bailee) through the agent (steamer agent) of the bailee – Appellant is only claiming through the bailor without any contractual relationship with the Board – Therefore, the Board would be entitled to enforce its rights flowing from the bailment between the ship-owner and the Board, against the consignee and recover expenses from him, incurred in connection with the bailment – Since the order of the Board declining total remission charges was not based on rational consideration and a sound policy, the order of the Board is set aside leaving it open to the Board to take appropriate decision duly recording the reasons for such decision – Major Port Trusts Act, 1963 – ss. 59(1) and 63 – Contract Act, 1872 – s. 158 – Bills of Lading Act, 1856 – s.1.

Plea:

New plea – Raising of – In Supreme Court – Permissibility – Held: A pure and substantial question of law cannot be barred from being raised for the first time.

Words and Phrases:

'Demurrage' – Meaning of.

'Bailment' – Meaning of.

Partly allowing the appeal, the Court

HELD: 1. Though the question as regards the liability of the appellant to pay the demurrage was not raised before the High Court, the appellant need not be barred from raising this question before this Court because it is a pure and substantial question of law. No enquiry into any fact is really necessary to decide the said question of law. The only fact which is not clearly established on record is the point of time at which the title in the goods passed to the appellant. [Paras 30, 31] [609-F-G; 610-B]

2.1 Enquiry into the title of the goods and the point of time at which the title passes to the consignee is irrelevant for determining the authority of a Board of Trustee to recover the amounts due to it under the Major Port Trusts Act, 1963. The authority and right of a Board to recover its dues either from the steamer agent or the consignee, flows from two different sources:

(i) Section 158 of the Contract Act, 1872 read with Section 1 of the Bills of Lading Act, 1856. (ii) Section 59(1) of 1963 Act. [Para 37] [615-B-C] A

2.2 The essence of bailment is possession and the consent of the owner of the goods is not necessary. There is a distinction between possession and custody of goods. Title to the goods is irrelevant even in the cases of a bailment arising under a contract. Any person who is capable of giving physical possession of goods can enter into a contract of bailment and create bailment. Bailment is a contractual relationship and bailment can be created by any person who is in possession/custody of goods but not necessarily the owner of the goods. When the purpose of bailment is accomplished, the goods are to be returned or otherwise disposed of according to the directions of the person (bailor) delivering them. [Paras 38 and 41] [615-C-D; 617-F-G] B C

Trustees of the Port of Bombay v. Premier Automobiles Ltd. [1981] 1 SCR 532 : (1981) 1 SCC 228 – relied on. D

2.3 Section 158 of the Contract Act stipulates the obligations of the bailor to pay the necessary expenses incurred by the bailee "for the purpose of bailment". The obligation of the bailee to return the bailed goods when the purpose of bailment is accomplished and the obligation of the bailor to pay the bailee "the necessary expenses incurred by him for the purpose of the bailment" would attend not only a bailment by contract but every kind of bailment. [Para 42] [618-C, E] E

2.4 If the bailor has such an obligation to pay the bailee, any person claiming through the bailor must necessarily be bound by such an obligation unless the bailee releases such person from such an obligation. A consignee is a person claiming through the consignor (bailor). In the context of import of goods into India by ship, the consignees' rights are governed *inter alia* by Section 1 of the Bills of Lading Act, 1856. The Act enacts a fiction that the consignee to whom the property in the goods shall pass, shall be "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself". Bill of lading is evidence of a contract between the F G H

A shipper (consignor) and the owner of the ship by which the owner of the ship agrees to transport the goods delivered by the consignor to a specified destination and deliver it to the consignee. Delivery of goods pursuant to a bill of lading creates a bailment between the shipper and the owner of the ship. Obviously the legislature knew that a consignee under a bill of lading is a 3rd party to the contract but intrinsically connected with the transaction and thought it necessary to specify the rights and obligations of the consignee. Hence, the fiction under the 1856 Act is that the moment the property in goods passes to the consignee, the liabilities of the consignee in respect of such goods would be the same as those of the consignor, as if the contract contained in the bill of lading had been made with the consignee. [Paras 43 and 44] [618-F; 619-A-D]

2.5 Section 63 of 1963 Act authorises the Board to sell the goods "placed in their Custody". Bailment can come into existence even otherwise than by a contract. There is no bailor and bailee relationship between the Board (the 1st respondent) and the consignee (the appellant); either voluntarily or statutorily compelled but such a relationship exists between the 1st respondent and the owner of the ship (through the steamer agent). It is possible in a given case where the consignee or any other person (such as the appellant) claiming through the consignor, eventually may not come forward to take delivery of the goods for a variety of reasons-considerations of economy or supervening disability imposed by law etc. Therefore, in such cases to say that merely because the bill of lading is endorsed or the delivery order is issued, the consignor or his agent is absolved of the responsibility for payment (of rates or rent for services rendered w.r.t goods) would result in a situation that the Board would incur expenses without any legal right to recover such amount from the consignor and be driven to litigation for recovering the same from the consignee who did not take delivery of the goods with whom the Board had no contract of bailment and consequently no contractual obligation to pay the 'rates or rent'. [Para 38] [615-D-E; 616-A, F-H; 617-A-B]

2.6 Enquiry into the relationship between either the Board, the consignor of goods, the owner of the vessel and the steamer

agent on one hand or the consignee and the Board on the other, is wholly irrelevant in examining the right of the Board to recover the amounts due towards the rates or rent for services rendered with respect to the goods. The right of the Board is unquestionable. The only question is: from whom can the Board recover and not who is liable. Depending on the nature of the relationship between the consignor and consignee, the liability may befall either of them. [Para 39] [617-B-D]

2.7 On the other hand, the 1st respondent is a sub-bailee of the goods bailed by consignor (bailor) to the ship-owner (bailee). The goods are bailed through the agent (steamer agent) of the bailee. The appellant is only a person claiming through the bailor, without any direct contractual relationship with the 1st respondent. [Para 40] [617-D-E]

2.8 Therefore, the 1st respondent (sub-bailee) would be entitled to enforce its rights flowing from the bailment between the ship-owner and the 1st respondent against the consignee and recover expenses incurred by it in connection with the bailment from the consignee. The terms and conditions of the contract between the consignor or person claiming delivery of the goods are irrelevant for determining the right of the 1st respondent to recover its dues. The obligations/liability of the consignee is determined by the statute. But the said obligation is not exclusive to the consignee. The consignor (bailor) is not relieved of the obligation to pay by virtue of Section 158 of the Contract Act the expenses incurred by the 1st respondent. The declaration under Section 42(7) absolving the owner of the ship and his agents is limited only to the obligations owed by the bailor to the consignee not to the sub-bailor like the 1st respondent. [Para 45] [619-D-G]

2.9 Section 59 of 1963 Act, creates lien in favour of 1st respondent in respect of any goods and also authorises the 1st respondent to seize and detain the goods, it clearly makes a special provision. Under the Contracts Act, every bailee has no lien on the goods delivered to him. Such a lien is available only to limited classes of bailees specified under Section 171. They are – bankers, factors, wharfingers, attorneys of a High Court and policy-brokers. It can be seen from Section 171 that only those

A specific categories of bailees have a right to retain goods bailed to them as security for the amounts due to them. No other category of bailee has such a right unless there is an express contract creating such a lien. Section 59 of 1963 Act, also expressly authorises the 1st respondent to seize and detain goods taken charge of by it. Parliament also invested the 1st respondent with the authority to sell the goods and appropriate the proceeds of sale under Section 63 of the 1963 Act towards various heads indicated thereunder without the need to file a suit. [Paras 46 and 47] [619-H; 620-A-C; 621-A]

2.10 If the 1963 Act authorises the 1st respondent to recover its dues by bailing the goods under bailment, in those cases where the consignee does not turn up to take the delivery of the goods within the time stipulated under Sections 61 or 62 of the 1963 Act, to deny the right to demand and recover the amounts due from the consignee when he seeks delivery of the goods under bailment would be illogical and inconsistent with the scheme of the 1963 Act. [Para 48] [621-B-C]

2.11 Denying such a right on the ground that the person claiming delivery of the goods acquired title to the goods only towards the end of the period of the bailment of the goods with the 1st respondent would result in driving the 1st respondent to recover the amount due to it from the bailor or his agent who may or may not be within the jurisdiction of the municipal courts of this country (by resorting to a cumbersome procedure of litigation). [Para 48] [621-D]

Trustees of the Port of Madras, Through its Chairman v. K.P.V. Sheikh Mohd. Rowther & Co. Pvt. Ltd. & Anr. (1997) 10 SCC 285; *Forbes Forbes Campbell & Company Limited v. Board of Trustees, Port of Bombay* (2015) 1 SCC 228 : [2014] 12 SCR 337 – relied on.

The Trustees of the Port of Madras by its Chairman v. K.P.V. Sheik Mohamed Rowther & Co. & Ors. [1963] Supp. 2 SCR 915 – held inapplicable.

Port of Bombay v. Sriyanesh Knitters (1999) 7 SCC 359 : [1999] 3 SCR 1238 – referred to.

Indian Contract and Specific Relief Acts by Pollock and Mulla, 13th Edition – **referred to.**

3.1 The guidelines permit granting of remission upto 80 per cent of demurrage in appropriate cases. However, the cap of 80 per cent is not absolute. The 1st respondent can even grant complete remission in appropriate cases. Admittedly, the 1st respondent granted remission to an extent of Rs.90,52,535.00 (approximately) out of the total claim towards demurrage of Rs.2,81,67,333.00. The liability to pay demurrage arose because of the non-clearance of the goods from the 1st respondent's property for a considerable period of time. [Para 49] [622-C-D]

3.2 Delay in taking delivery before the point of time when appellant started claiming the right to take delivery, is attributable purely to the failure of the original consignee. The appellant clearly knew or at least ought to have known, when he purchased the goods that the 1st respondent would demand demurrage. The appellant as a person claiming through the consignor is not entitled in law to claim any right of remission on the ground that he did not have any interest or title in the goods for such period. Delay after the appellant's right to take delivery of goods came into existence, occurred because of the time taken in ensuring that the appellant complied with the various statutory obligations to import goods such as amendment of the IGM etc. The fact that the appellant was not permitted to clear the goods because of the pendency of some proceedings initiated by the customs authorities by itself does not create a right of remission in favour of the appellant. Though it may constitute a relevant circumstance for considering granting remission if the 1st respondent so chooses as a matter of policy. As a matter of fact, remission of a part of the demurrage was granted by the 1st respondent. [Paras 49 and 50] [623-A-D]

International Airports Authority of India v. Grand Slam International **(1995) 3 SCC 151 : [1995] 2 SCR 149– referred to.**

3.3 The respondent's decision to decline remission to the appellant cannot be called discriminatory, on the ground that

A **remission was granted in the case of a similarly situated consignee. The cases of that consignee and that of the appellant are not identical. [Paras 51 and 52] [623-E-F]**

3.4 However, the authority of the 1st respondent to grant or decline remission of any amount due towards any rate payable B **under the 1963 Act must be based on rational consideration and a sound policy. Such a requirement is inherent in the fact that 1st respondent is a statutory body discharging important statutory obligations. 1st respondent could not bring anything on record which demonstrates the reasons for declining remission as claimed by the appellant nor any clear policy of the respondent** C **which regulates the discretion. Therefore, the decision of 1st respondent dated 16.09.1995 in declining the remission is set aside and it is left open to the respondent to take appropriate decision on the application duly recording the reasons for such decision. [Para 53] [624-B-D]**

D *Trustees of the Port of Madras v. Aminchand Pyarelal & Ors.* **(1976) 3 SCC 167 : [1976] 1 SCR 721**; *International Airport Authority of India v. Ashok Dhawan and Ors.* **(1997) 11 SCC 343 – referred to.**

E **Case Law Reference**

[1976] 1 SCR 721	**referred to**	**Para 25**
(1997) 11 SCC 343	**referred to**	**Para 26**
[1963] Supp. 2 SCR 915	**held inapplicable**	**Para 32**
F **(1997) 10 SCC 285**	**relied on**	**Para 32**
[2014] 12 SCR 337	**relied on**	**Para 32**
[1999] 3 SCR 1238	**referred to**	**Para 36**
G **[1981] 1 SCR 532**	**relied on**	**Para 38**
[1995] 2 SCR 149	**referred to**	**Para 50**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5968 H of2011.

From the Judgment and Order dated 12.04.2010 of the High Court of Judicature at Bombay in Writ Petition No. 2012 of 1996.

Anirudh Deshmukh, Mohit D. Ram, Advs. for the Appellant.

Ms. Pinky Anand, ASG., Parag P. Tripathi, Ashok Panda, Sr. Advs., A. V. Rangam, Buddy A. Ranganadhan, D. V. Raghu Vamsy, Kabir Hathi, Ashok K. Srivastav, Shashank Dewan, B. Krishna Prasad, Advs. for the Respondents.

The Judgment of the Court was delivered by

J. CHELAMESWAR, J. 1. Written submissions filed by the appellant present a reasonably concise and sufficiently reliable statement of facts for adjudication of this appeal. Insofar as relevant they are:

"During the period November 1991 to January 1992, 78 shipments of zinc ingots and copper iron bars were imported by 5 different consignees from one M/s Metal Distributors (UK) Ltd.; these consignments were landed at the Bombay Port. The consignees filed bills of entry for 37 out of the 78 consignments, but subsequently failed to lift the consignments and thus, they came to be stored at by the Port of Bombay.

The distinguishing factor of the above consignments was that they were shipped on "CAD Basis" i.e. cash against documents, in which the title to the goods would remain with the exporter till such a time the importer would retire the documents against payments.

Facing a grave loss M/s Metal Distributors (UK) Ltd., requested the present petitioner, if they were interested in purchasing the goods. It is pertinent to mention that the present petitioner and the original consignees are no where related, and the present petitioner is a third party to the sales.

On 23.03.1992, the petitioner through his agent applied to the Customs Authorities to have the Bills of Entry substituted in their name for the 37 consignments for which the original consignees had filed Bills of Entry, and also applied to file Bills of Entry for the remaining 41 consignments lying unclaimed. The formal agreement between the M/s Metal Distributors (UK) Ltd. and the petitioner was entered subsequently, in April of 1992.

A That on 05.05.1992 the Clearing Agent of the petitioner wrote to the Customs Authorities seeking an amendment of the IGM so that the goods could be cleared. This was followed by a communication dated 03.06.1992 from the original exporter i.e. M/s Metal Distributors UK that the petitioner had agreed to buy the aforesaid consignments since the original importers had failed to clear the goods.

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It is pertinent to mention that on 04.09.1992 the Customs Authority wrote to the petitioner stating that would be granting permission to amend the IGM for only 41 consignments and that the balance 37 consignments on the ground that Bills of Entry for those consignments stood filed.

C On 09.09.1992 the petitioner was granted a detention certificate by the Customs Authority for the aforesaid 41 consignments signifying the period of detention as from 09.06.1992 to 09.09.1992. Since the said period was incorrect, the petitioner requested the Customs Authority to correct the Detention Certificate and the same was subsequently D corrected to reflect the date as 23.03.1992 to 09.09.1992. It is pertinent to mention that the Detention Certificate initially read "for procedural formalities for amending the IGM" however subsequently the aforesaid detention certificates were amended by the Detention Certificates dated 18.11.1993 and 01.12.1993 for the 41 consignments and specifically read for "bonafide operation of ITC Formalities".

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In the meantime the Government of India was pleased to notify the "Statement of Guidelines for Remission of Demurrage Charges", 1992, vide which in certain cases where goods/consignments detained by Customs for "ITC Facilities" were to be considered for grant of remission from payment of demurrage for the period the goods were F being so processed by Customs Authorities.

In the meantime the Port of Bombay levied a total of Rs.2,81,67,333 as demurrage charges, the total remission granted by the Port of Bombay was Rs.90,52,535, and therefore demanded a balance of Rs.1,91,14,798 on the ground that the petitioner was liable to pay G demurrage for the period of 23.03.1992 till 09.09.1992, on the ground that no remission could be granted prior to date of noting.

Thus, on 16.09.1995, the Port of Bombay rejected the request of the petitioner for grant of remission of demurrage."

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2. Aggrieved by the order of the Ist respondent, the appellant, filed WP No.2012/1996[1]. The appellant however cleared the goods after making payment of the amount (claimed by the 1st respondent towards demurrage), under protest.

3. By the judgment under appeal dated 12.4.2010, the High Court dismissed the writ petition. Hence the appeal.

4. The only issue pleaded and argued before the High Court in the above-mentioned writ petition was the correctness of the decision of the 1st respondent to decline grant of remission of the entire demand towards demurrage on account of non-clearance of the goods.

5. However, before us, a twofold submission is made by the appellant:

(i) that the appellant acquired title to the goods long after they arrived in the 1st respondent's port and discharged from the vessel which carried the goods. Therefore, demurrage

[1] Prayer in Writ Petition No.2012 of 1996:

(a) The this Hon'ble Court be pleased to declare that the impugned action on the part of the Respondents 1 to 3 in not granting the remission of demurrage charges in respect of the said consignments since inception and restricting granting of remission of demurrage charges only from the date of filing of the bills of entry in the name of the petitioners were and are unlawful, illegal and null and void.

(b) That this Hon'ble Court be pleased to issue a writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ, order or direction calling for the record and proceedings in the matter of the application of the petitioners for review and reconsideration of the grant of remission/refund of demurrage charges of various consignments set out in the petition hereabove as also in relation to the said communication dated 24.5.1996 and after considering the validity, legality and propriety thereof, be pleased to quash and set aside the said action and/or decision on the part of the Respondents 1 to 3 in not granting further remission of demurrage charges in favour of the petitioners;

(c) That this Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction ordering and directing the Respondents 1 to 3 to forthwith grant remission and/or refund of the amount of Rs. alongwith interest thereon at the rate of 18% per annum from the date of payment of the respective amounts as per the statement annexed hereto and marked as Exhibit in favour of the petitioners;

(d) In the alternative and without prejudice to the above;

This Hon'ble Court be pleased to order the Respondents 4 and 5 to pay to the petitioners the deficit amount after considering the remission that has already been granted and that will be granted by the Respondent 1 to 3 along with interest thereon at 18% per annum from such date as this Hon'ble Court may deem fit;

A payable for the period anterior to appellant's acquisition of title to the goods is to be collected from the steamer agent of the vessel; and the appellant incurs no liability in law to pay the demurrage - since the 1st respondent rendered no service to the appellant during that period;

B (ii) In the alternative, it is argued that in view of the facts and circumstances of the case, the appellant is entitled for complete remission of the amount claimed towards demurrage on account of delayed clearance of the goods. According to the appellant – a substantial portion of the delay occurred because of the non-clearance of the goods by the customs department.

C (iii) An ancillary submission in this regard is that the 1st respondent granted complete remission of the amount payable towards demurrage in the case of another importer i.e. M/s. Gilt Pack who was similarly situated. Therefore, the action of the 1st respondent in declining remission to the appellant is

D discriminatory.

6. To decide the correctness of the various submissions noted above, an examination of the rights and obligations of the 1st respondent and its authority to collect demurrage is required.

7. Import and export of goods into any country has always been

E the subject matter of regulation. This has been a potential source for raising revenue. Import or export of goods could be either by land, sea or air; by use of vehicles, vessels or aircrafts. Since we are concerned in this case with import of goods by sea, we confine our examination to the law dealing with it.

F Without going into the historical details of the import export trade and regulations thereon, suffice it to state that under Section 29[2] of the Customs Act, 1962, the person-in-charge of a vessel entering India from any place outside India is prohibited from causing or permitting the entry of such vessel at any place other than a customs port, subject to certain

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G [2] Section 29. Arrival of vessels and aircrafts in India.—(1) The person-in-charge of a vessel ... entering India from any place outside India shall not cause or permit the vessel ... to call or ... —

(a) for the first time after arrival in India; or

(b) at any time while it is carrying passengers or cargo brought in that vessel or aircraft, at any place other than a customs port or a customs airport, as the case may be unless permitted by the Board.

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exceptions. The expression "customs port" is defined under Section 2(12)[3] of the Customs Act, 1962. Section 7 thereof authorises the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 to appoint by a notification in the official gazette, the ports which alone shall be customs ports for the unloading of imported goods and the loading of export goods etc.

Indian Ports Acts, 1855, 1875, 1889 and 1908 regulated the activities of the ports in India. The Port Trust Acts of 1879, 1890 and 1905 of Bombay, Calcutta and Madras respectively regulated the activities of the said ports in India through Port Trusts (bodies corporate).

8. Some of these are repealed and others modified[4] by the Major Port Trusts Act, 1963 (hereinafter referred to as "THE ACT") which is a law made by the Parliament "to make provision for the constitution of port authorities for certain major ports in India and to vest the administration, control and management of such ports in those authorities". Section 3 of THE ACT authorises the Central Government to constitute a Board of Trustees in respect of any major port. Qua the definition under Section 2(b)[5], the Board of Trustees so constituted is called BOARD[6]. Section 5 of the ACT declares each of the BOARDS to be a body corporate to administer, control and manage the port of Bombay. Different BOARDS came to be constituted for different major ports in the country. The 1st respondent is admittedly one of the BOARDS constituted under Section 3(1) of THE ACT.

9. We shall now examine the provisions of THE ACT insofar as it is relevant for the purpose of this case.

10. Section 35(1)[7] of the Act obligates BOARDS to execute

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[3] Section 2(12): "customs port" means any port appointed under clause (a) of section 7 to be a customs port, and includes a place appointed under clause (aa) of that section to be an inland container depot.

[4] A complete analysis of the evolution of the law in this regard requires an elaborate study and would be beyond the scope of any judgment.

[5] Section 2(b) "Board", in relation to a port, means the Board of Trustees constituted under this Act for that port;

[6] Section 3. Constitution of Board of Trustees.—(1) With effect from such date as may be specified by notification in the Official Gazette, the Central Government shall cause to be constituted in respect of any major port a Board of Trustees to be called the Board of Trustees of that port, which shall consist of the following Trustees, namely ...

[7] Section 35 (1) A Board may execute such works within or without the limits of the port and provide such appliances as it may deem necessary or expedient.

various works, within or even without the limits of the ports[8] being administered by each of the BOARDS, of the nature indicated under Section 35(2)(a) to (l). An examination of the tenor of the various clauses indicates that such works are intended to facilitate creation of ports which can be conveniently used by (vessels[9]) for loading and unloading of cargo etc.

11. Section 37 to 42 of the Act authorise BOARDS to compel sea going vessels to use the works executed by BOARDS for landing or shipping of any goods or passengers, subject to various conditions specified under the said provisions.

12. Section 41(1) contemplates the publication of a notified order. By such an order, BOARD may "(i) declare that such dock, berth, wharf, quay, stage, jetty or pier is ready for receiving, landing or shipment of goods or passengers from or on vessels, not being sea-going vessels, and, (ii) direct that within certain limits to be specified therein it shall not be lawful, without the express sanction of the Board, to land or ship any goods or passengers out of, or into, any vessel, not being a sea-going vessel, of any class specified in such order, except at such dock, berth, wharf, quay, stage, jetty or pier". Section 41(2) declares that once such a notified order is published, "it shall not be lawful without the consent of the Board for any vessel":

(i) to land or ship any goods or passengers at any place within the limits so specified, except at such dock, berth, wharf, quay, stage, jetty or pier; or

(ii) while within such limits, to anchor, fasten or lie within fifty yards of the ordinary low-water mark."

13. Section 42(2) authorises BOARDS to take charge of the goods for performing such services.

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[8] The expression "Port" is defined under Section 2(q) as follows:-

"Section 2 (q) "port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act;"

[9] Section 2(z) "vessel" includes anything made for the conveyance, mainly by water, of human beings or of goods and a caisson;"

A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

Sub-section (7) declares that when the charge of the goods is taken and receipt given, the recipient is discharged of any liability for the damage or loss occurring to the goods thereafter[10].

14. Section 43 stipulates the nature and extent of the responsibility of BOARDS for any loss or destruction or deterioration in the goods which were taken charge of by BOARD - details of which are not necessary for the present purpose.

15. Chapter VI of the Act deals with imposition and recovery of **rates** at ports. The expression **"rate"** is defined under Section 2(v)[11].

16. Various services which BOARDS are obliged to perform are specified under various provisions of THE ACT. Those services fall into three categories – (1) services rendered to the vessel entering the Port; (2) services rendered to goods either imported by vessels or to be exported through vessel, and (3) services rendered to passengers arriving or departing from vessels in the Port.

17. Sections 49A, 49B, 50A and 50B deal with services to be rendered by a BOARD exclusively to vessels using the Port administered by BOARDS and authorise the collection of various **rates** specified under each of those sections for services referred to therein, as and when rendered.

18. Section 48 prior to its amendment (by Act 15 of 1997) authorised every BOARD administering each of the major ports to prescribe a scale of **rates** for various services rendered by that BOARD.

Section 48 (pre 1997 Amendment)[12]

"Section 48. Scales of rates for services performed by Board or other person.—(1) Every Board shall from time to time frame a

[10] Section 42(7). After any goods have been taken charge of and a receipt given for them under this section, **no liability for any loss or damage which may occur to them** shall attach to any person to whom a receipt has been given or to the master or **owner of the vessel from which the goods have been landed or transshipped.**

[11] Section 2(v) - "rate" includes any toll, due, rent, rate, fee, or charge leviable under this Act;

[12] Post 1997, a common authority (TARIFF AUTHORITY) for all major ports is brought into existence under Section 47A to frame scales.

A scale of **rates** at which and a statement of the conditions under which, any of the services specified hereunder shall be performed by itself or any person authorised under section 42 at or in relation to the port or port approaches—

(a) transshipping of passengers or goods between vessels in the B port or port approaches;

(b) landing and shipping of passengers or goods from or to such vessels to or from any wharf, quay, jetty, pier, dock, berth, mooring, stage or erection, land or building in the possession or occupation of the Board or at any place within the limits of C the port or port approaches;

(c) cranage or porterage of goods on any such place;

(d) wharfage, storage or demurrage of goods on any such place;

D (e) any other service in respect of vessels, passengers or goods, excepting the services in respect of vessels for which fees are chargeable under the Indian Ports Act.

(2) Different scales and conditions may be framed for different classes of goods and vessels."

E Section 48(1)(a) and (b) indicate the nature of services to be rendered by BOARDS. Section 48(1)(c) and (d) indicate the nature of the rate payable for such services. Clause (d) *inter alia* provides that BOARDS can frame scale of **rates** for storage or demurrage of goods on any such place. The expression "such place" occurring under clause F (d) must necessarily refer to the places mentioned in Section 48(1)(b) i.e. wharf, quay, jetty, pier, dock, berth etc executed by, and land or building either in "possession or occupation" of BOARDS.

19. It is apparent from the language of Section 48 that though it authorises BOARDS to stipulate and collect **rates** for various services to be rendered, **the Act is silent regarding persons from whom** G **such rates could be collected**. It is pertinent to note that since services contemplated under Sections 49A, 49B, 50A and 50B are services exclusively to be rendered to the vessel (ship). It is reasonable to interpret that only the ship and its agents are liable to pay the **rates** for those services. We are fortified in our conclusion by the language of Sections

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50A[13] and 50B[14] which make it express when they say "she[15] would otherwise be chargeable". A

20. Section 64 authorises BOARDS to "distrain or arrest" a vessel when the master of that vessel refuses or neglects to pay any rate or penalty payable under this Act and to "detain" the vessel until the amount due to the BOARD is paid. B

21. On the other hand, with reference to services rendered to goods, a lien[16] is created under Section 59(1)[17] on the goods, in favour of BOARDS, and BOARDS are also entitled to seize and detain the goods until the **rates** and rents are fully paid.

22. It appears to us that in view of the fact Section 42(2) only contemplates "taking charge" of the goods but not "taking possession" of goods, Parliament conferred on BOARDS the authority to "seize and detain" the goods of which charge is taken of. The purpose behind the twin declarations contained in Section 59 is a little intriguing. However, we do not wish to express any final opinion in this regard as no submission in this regard is made and such an examination is not necessary for deciding the case on hand. C D

23. Under Sections 61 and 62 of the Act, such detained goods could be sold by the BOARD either by public auction or otherwise, subject to conditions stipulated in those Sections and following the procedure specified thereunder without the need to file a suit for the recovery of the amounts due to the BOARDS. E

[13] Section 50A. Port-due on vessels in ballast.— A vessel entering any port in ballast and not carrying passengers shall be charged with a port-due at a rate to be determined by the Authority and not exceeding three-fourths of the rate with which she would otherwise be chargeable.

[14] Section 50B. Port-due on vessels not discharging or taking in cargo.— **When a vessel enters a port** but does not discharge or take in any cargo or passengers therein, (within the exception of such unshipment and reshipment as may be necessary for purposes of repair), **she shall be charged with a port-due** at a rate to be determined by the authority and not exceeding half the rate with which she would otherwise be chargeable. F

[15] In Maritime Law by a long established practice a vessel is always referred to as "she".

[16] Lien is defined in Halsbury's Laws of England (4th Edition, Volume 28 at page 221, para 502) as "In its primary or legal sense "lien" means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied." G

[17] Section 59. Board's lien for rates.—(1) For the amount of all rates leviable under this Act in respect of any goods, and for the rent due to the Board for any buildings, 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, and may seize and detain the same until such rates and rents are fully paid. H

A 24. The dispute in this case centres around demurrage. Therefore, we deem it appropriate to examine the meaning of the expression "demurrage". The expression "demurrage" is not defined under the Act. Strictly speaking, the expression demurrage in the world of shipping meant-

> "DEMURRAGE in its strict meaning, is a sum agreed by the
> B charterer to be paid as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading, generally referred to as the lay-days or lay-time. Where the sum is only to be paid for a fixed number of days, and a further delay takes place, the shipowner's remedy is to recover unliquidated "damages for detention" for the period of the delay. The phrase "demurrage"
> C is sometimes loosely used to cover both these meanings."[18]

The circumstances in which and the nature of demurrage payable in a given circumstance has been the subject matter of considerable legal literature[19]. However, in India, the expression "demurrage" appears to have acquired a different connotation.

D Under the Madras Port Trust Act, 1905, certain bye-laws were framed by the Port Trust in exercise of the statutory powers under which "Scale of Rates" payable at the Port of Madras were framed. Chapter IV thereof was headed "Demurrage". Under the said Chapter, it was stipulated that "demurrage is chargeable on all goods left in Board's
E transit sheds or yards beyond the expiry of the free days".

25. In ***Trustees of the Port of Madras v. Aminchand Pyarelal & Others,*** (1976) 3 SCC 167, this Court had an occasion to consider the true meaning of "demurrage" occurring in the above mentioned context and opined[20] that the "Board has used the expression "demurrage" not in the strict mercantile sense but merely to signify a charge which may
F be levied on goods after the expiration of free days".

26. Regulation 2(g) of the International Airports Authority (Storage and Processing of Goods) Regulation, 1980 made under the provisions

[18] Scrutton on Charterparties and Bills of Lading, Twenty Third Edition, p.380

[19] Useful reference can be made to Halsbury's Laws of England, Fourth Edition. Similarly,
G a seminal work titled "Law on Demurrage" by Hugo Tiberg covering laws of various countries on the subject.

[20] Para **31.** The High Court has cited many texts and dictionaries bearing on the meaning of "demurrage" but these have no relevance for the reason that demurrage being a charge and not a service, the power of the Board is not limited to fixing rates of demurrage. Besides, it is plain that the Board has used the expression "demurrage" not in the strict mercantile sense but merely to signify a charge which may be levied on goods after the
H expiration of free days. Rule 13(*b*) itself furnishes a clue to the sense in which the

of the International Airports Authority Act, 1971, defined the expression 'demurrage' to mean, the rate or amount payable to the airport by a shipper or consignee or carrier, for not removing the cargo within the time allowed.[21] A

27. By virtue of Section 59[22] of THE ACT, the 1st respondent had a lien on goods placed on or in the property of the 1st respondent "for the amount of all rates leviable under the Act" and also the authority/ right to seize and detain goods placed on or in any premises belonging to the 1st respondent until the amount due towards the rent or any rate for any services rendered by the 1st respondent with respect to such goods is fully paid. Further, the 1st respondent is also entitled under Sections 61 and 62 to sell the goods in question so seized and detained without the need to file a suit for the recovery of the amounts due to it. B C

28. We shall now deal with submissions by the appellant.

29. The first submission is that the amounts due for providing the various (services to the imported goods) until the title in the goods passed to the appellant would be a services rendered to the steamer agent. The appellant cannot be compelled to pay for services not rendered to him. Such an argument is based on- D

(i) that the goods in question were shipped by the exporter on Cash against Document Basis (CAD), therefore the title of the goods would remain with the exporter till such time, the importer "retires the documents against payments"; E

(ii) The owner of the vessel is a bailee of the shipper. The 1st respondent is sub-bailee of the owner of the vessel through his steamer agent for the vessel from the point of their discharge from the vessel till the point when title in the goods passed to the appellant. F

30. The 1st respondent, on the other hand, argued that the question regarding the liability of the appellant to pay the demurrage was never raised before the High Court nor did the High Court consider that question

expression "demurrage" is used by the Board. It provides, inter alia, that "demurrage" shall be recovered at a concessional rate for a period of thirty days plus one working day where the goods are detained for compliance with certain formalities and where the Collector of Customs certifies that the detention of goods is "not attributable to any fault or negligence on the part of importers". G

[21] *See* International Airport Authority of India v. Ashok Dhawan & Others, (1997) 11 SCC 343

[22] See F/N 17 H

A and, therefore, the appellant may not be permitted to make the said submission.[23]

31. In our opinion, though the question was not raised before the High Court, the appellant need not be barred from raising this question before us because it is a pure and substantial question of law. No enquiry into any fact is really necessary to decide the said question of law. The B only fact which is not clearly established on record is the point of time at which the title in the goods passed to the appellant. But, in our opinion (for the reasons to be given later), that fact is wholly irrelevant for determining the authority of the 1st respondent to collect demurrage from the appellant. We, therefore, proceed to examine the correctness of the C submission.

32. In support of this submission, the appellant relied upon three judgments of this Court in ***The Trustees of the Port of Madras by its Chairman v. K.P.V. Sheik Mohamed Rowther & Co. & Others***, (1963) Supp. 2 SCR 915 (hereafter "ROWTHER-I"), ***Trustees of the Port of Madras, Through its Chairman v. K.P.V. Sheikh Mohd. Rowther &*** D ***Co. Pvt. Ltd. & Another,*** (1997) 10 SCC 285 (hereafter "ROWTHER-II") and ***Forbes Forbes Campbell & Company Limited v. Board of Trustees, Port of Bombay,*** (2015) 1 SCC 228.

ROWTHER-I is a case which arose under the Madras Port Trust Act, 1905.

E

In exercise of the power under Section 42 of the said Act the Board of the Madras Port Trust made certain scale of **rates**. One of the items in the scales stipulated charges to be paid by "masters, owners or agents of vessels" in respect of port trust labour requisitioned and supplied by it but not fully or properly utilized.

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A writ petition came to be filed in the Madras High Court for a direction to the Board not to enforce the said **rates**.

It was argued that under provisions of the Madras Port Trust Act, certain services are to be rendered to the vessel and certain services to the goods carried by the vessel. The service such as the one for which

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[23] See also para 1 of the written submissions of the respondent;

"1. The entire claim of the Appellants before the Respondents and in the Writ Petition was for remission. (Ref pg @79 (Request for Remission) and page 143 (Writ Prayers). Having sought "remission" of the accrued demurrage, it is obvious that the appellants had admitted their liability to pay the demurrage. If the appellants have not been so liable, there was no question of them claiming remission. Hence, H today, it is not open to the Appellants to dispute the liability."

the rate had been demanded was a service rendered to the consignee and not to the steamer agent. Therefore steamer agents could not be compelled to pay the rate for the said service.

The Madras High Court dismissed the writ petition. An intra court appeal thereon was allowed by the Division Bench holding that the service in question "must be deemed to be service rendered to the consignee". On a further appeal, this Court recorded the issue in para 30:-

> "30. The question for determination, in the case then is whether the law making the steamer-agent liable to pay these charges is good **law**[24]."

33. The entire argument in the case revolved around the question whether the Madras Port Trust was acting as an agent of the consignee or the steamer agent when it took charge of goods discharged from the vessel. The case of the steamer agent was that the Madras Port Trust acted as the agent of the consignee. This submission was rejected. This Court held:

> "57. If the Board was an agent of the consignee, it was bound to deliver the goods to the consignee and should not have any rights of retaining the goods till the payment of the rates and other dues for which it had a lien on the goods. The provision of there being a lien on the goods for the payment of the dues of the Board or the freight, make it clear that the Board did not have the custody of the goods as an agent of the consignee."

The appeal was allowed by this Court upholding the authority of the port trust to collect the **'rate'** from the steamer agent.

34. This Court held that **BOARD** receives goods as a sub-bailee from the bailee (ship owner) through the bailee's agent (See para 49[25]

[24] It may be mentioned that the law referred above is a piece of subordinate legislation.

[25] Para 49. These observations apply when the goods are to be delivered to the consignee alongside the ship and not when they are handed over to the statutory body, like the Board, as a sub-bailee. How the delivery is to be made depends on the terms of the bill of lading and the custom of the Port. The case is no authority for the proposition that in all circumstances the master of the vessel is not responsible for the performance of the acts subsequent to his placing the goods in such a position that the consignee can get them, as contended for the respondents. The delivery contemplated in these observations, is not, in our opinion, equivalent to the landing of the goods at the quay as contemplated by the various provisions of the Act.

A of the judgment). This Court upheld the impugned provision which fastened the liability upon the steamer agent. This Court opined that the goods were delivered to the BOARD by the consignor's bailee (the ship owner) through the steamer agent (the bailee's agent) making the BOARD a sub-bailee. Therefore, the service rendered by the BOARD is a service to the owner of the ship.

B

ROWTHER-I is not an authority for the proposition that a **BOARD** could collect **rates** due for the services rendered to goods **only** from the steamer agent. Nor did this Court deal with the question whether the title in the goods is a relevant factor for determining a C BOARD'S right to collect the **rates**.

ROWTHER-I is no authority for the proposition that until the title in goods passed to the consignee the liability to pay various **rates** payable to a BOARD for the services rendered in respect of the goods falls exclusively on the steamer agent.

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35. In ROWTHER-II, the question was "whether demurrage charges, harbour dues etc." were to be recovered from the consignee or the steamer agent.

The Madras High Court concluded that the consignee was liable E to pay the demurrage.

It was a case where the goods remained in the custody of the Port Trust for a long time and were ultimately confiscated by the customs authorities. Whether demurrage was to be recovered from the steamer agent or the consignee was in issue.

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High Court held that the steamer agent's responsibility ceases "once the goods are handed over to the Port Trust" and the bill of lading is endorsed[26]. The High Court further held that upon the endorsement of the Bill of lading, "the property in the goods vests" in the consignee and therefore the steamer agent's responsibility for the custody of the

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[26] ".....Once the goods are handed over to the Port Trust by the steamer and the steamer agents have duly endorsed the bill of lading or issued the delivery order, their obligation to deliver the goods personally to the owner or the endorsee comes to an end. The subsequent detention of the goods by the Port Trust as a result of the intervention by the Customs authorities cannot be said to be on behalf of or for the benefit of the steamer agents."

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goods ceases[27]. The High Court, therefore, concluded that only the consignee was liable. A

This Court approved the conclusion of the High Court.

36. In ***Forbes Forbes Campbell & Company Limited v. Board of Trustees, Port of Bombay***, (2015) 1 SCC 228, this Court examined the liability of the steamer agent to pay demurrage and port charges to the BOARD of Bombay Port in respect of goods brought into the Port and warehoused by the said authority. B

The question arose in the context of the BOARD'S resolution to recover the rent (on cargo transported in containers) from the steamer agent. The steamer agent contended that neither THE ACT nor the subordinate legislation made thereunder created such liability either on the ship owner or his agent (steamer agent). C

Rejecting such submission, this Court held that "in the absence of any specific bar in the statute, such liability can reasonably fall on the steamer agent", if on a proper construction of the provisions of the Act such a conclusion can be reached. D

> "Para 10. While it is correct that the liability to pay demurrage charges and port rent is statutory, in the absence of any specific bar under the statute, such liability can reasonably fall on a steamer agent if on a construction of the **provisions of the Act such a conclusion can be reached**. Determination of the aforesaid question really does not hinge on the meaning of the expression "owner" as appearing in Section 2(*o*) of the 1963 Act, as has been sought to be urged on behalf of the appellant though going by the language of Section 2(*o*) and the other provisions of the Act especially Section 42, an owner would include a shipowner or his agent. Otherwise it is difficult to reconcile how custody of the goods for the purpose of rendering services under Section 42 can be entrusted to the Port Trust Authority by the owner as provided therein under Section 42(2). At that stage the goods may still be in the custody of the shipowner under a separate bailment E F G

[27] .....By the endorsement of the bill of lading or the issue of a delivery order by the steamer agents, the property in the goods vests on such consignee or endorsee, and thus it appears to be clear that the steamer or the steamer agents are not responsible for the custody of the goods after the property in the goods passes to the consignee or endorsee till the Customs authorities actually give a clearance. H

A with the shipper or the consignor, as may be. Even dehors the above question the liability to pay demurrage charges and port rent would accrue to the account of the steamer agent **if a** contract of bailment between the steamer agent and the Port Trust Authority can be held to come into existence under Section 42(2) read with Section 43(1)(*ii*) of the 1963 Act."

B

On examination of the provisions of THE ACT and two earlier judgments[28], this Court rejected the submission that there comes into existence the relationship of **bailor and bailee** between the consignee and the BOARD as was held earlier by this Court in ***Sriyanesh Knitters.***

C "11. For the reasons already indicated the decision in Sriyanesh Knitters with regard to the existence of a relationship of bailor and bailee between the consignee and the Port Trust Authority instead of the steamer agent and the Port Trust Authority cannot be understood to be a restatement of a general principle of law but a mere conclusion reached in the facts of the case where the

D consignee had already appeared in the scene."

and concluded[29] that once the bill of lading is endorsed or the delivery order issued, it is the consignee or endorsee who would be liable to pay the demurrage and other dues of the Port Trust Authority. It further held that in all other situations the contract of bailment is one between the

E agent of the bailor and the BOARD (Bailee) fastening the liability on the (steamer) agent for such **rates** till such time the bill of lading is endorsed or delivery order is issued by the steamer agent.

37. With respect, we agree with the conclusions recorded by this Court in the cases of **ROWTHER-II** and ***Forbes*** that a BOARD could

F recover the **rates** due, either from the steamer agent or the consignee but we are of the humble opinion that enquiry into the question as to when the property in the goods passes to the consignee is not relevant.

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[28] **ROWTHER-I** and ***Port of Bombay v. Sriyanesh Knitters***, (1999) 7 SCC 359

G [29] Para 12. From the above, the position of law which appears to emerge is that once the bill of lading is endorsed or the delivery order is issued it is the consignee or endorsee who would be liable to pay the demurrage charges and other dues of the Port Trust Authority. In all other situations the contract of bailment is one between the steamer agent (bailor) and the Port Trust Authority (bailee) giving rise to the liability of the steamer agent for such charges till such time that the bill of lading is endorsed or

H delivery order is issued by the steamer agent.

We have already noticed the submission of the appellant that the appellant is not liable to make payment of any demurrage incurred prior to the acquisition of title in the goods by the appellant. Enquiry into the title of the goods and the point of time at which the title passes to the consignee is equally irrelevant for determining the authority of a BOARD to recover the amounts due to it under THE ACT. The authority and right of a BOARD to recover its dues either from the steamer agent or the consignee flows from two different sources:

(i) Section 158 of the Indian Contract Act, 1872 read with Section 1 of the Indian Bills of Lading Act, 1856.

(ii) Section 59(1) of THE ACT.

38. The essence of bailment is possession and the consent of the owner of the goods is not necessary.[30] The distinction between possession and custody of goods is also noted by jurists.[31] In this context, the language of Section 49(2) is significant - "A Board may..... take charge of the goods.....". But we do not propose to examine the significance as the same is neither argued nor necessary. In our opinion, for the purpose of the present, we must also mention here that Section 63 of THE ACT authorises the BOARD to sell the goods "placed in their CUSTODY".

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[30] **Trustees of the Port of Bombay Vs. Premier Automobiles Ltd.** (1981) 1 SCC 228, para 11.

"11. It is well settled that the essence of bailment is possession. It is equally well settled that a bailment may arise, as in this case, even when the owner of the goods has not consented to their possession by the bailee at all : PALMER ON BAILMENT, 1979 edition, page 2. There may thus be bailment when a wharfinger takes possession of goods unloaded at the quay side. A bailment is not therefore technically and essentially subject to the limitations of an agreement, and the notion of privity need not be introduced in an area where it is unnecessary, for bailment, as we have said, arises out of possession, and essentially connotes the relationship between a person and the thing in his charge. It is sufficient if that possession is within the knowledge of the person concerned. It follows that a bailment may very well exist without the creation of a contract between the parties and it essentially gives rise to remedies which, in truth and substance, cannot be said to be contractual. That is why Palmer has made the assertion that "bailment is predominantly a tortuous relation" (page 36), and the two are fundamentally similar.

[31] 'Bailment' is a technical term of the common law, though etymologically it might mean any kind of handing over. It involves change of possession. One who has custody without possession, like a servant, or a guest using his host's goods, is not a bailee. **[*See*: Pollock & *Mulla*, The *Indian Contract and* Specific Relief Acts, 13th Ed. Page 1931]**

A This Court also recognised that bailment can come into existence even otherwise than by a contract.

"The State of Gujarat Vs. Memon Mahomed Haji Hasam (Dead) by LRs, AIR 1967 SC 1885, paras 5 and 6

B "5. .....Bailment is dealt with by the Contract Act only in cases where it arises from a contract but it is not correct to say that there cannot be a bailment without an enforceable contract. As stated in "Possession in the Common Law" by Pollock and Wright, p. 163.

C "Upon the whole, it is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according

D to the directions antecedent or future of the other person." "Bailment is a relationship sui generis and unless it is sought to increase or diminish the burdens imposed upon the bailee by the very fact of the bailment, it is not necessary to incorporate it into the law of contract and to prove a consideration"

E 6. There can, therefore, be bailment and the relationship of a bailor and a bailee in respect of specific property without there being an enforceable contract. Nor is consent indispensible for such a relationship to arise. A finder of goods of another has been held to be a bailee in certain circumstances."

F As rightly opined in FORBES' case, there is no bailor and bailee relationship between the BOARD (the 1st respondent) and the consignee (the appellant); either voluntarily or statutorily compelled but such a relationship exists between the 1st respondent and the owner of the ship (through the steamer agent). It is possible in a given case where the

G consignee or any other person (such as the appellant herein) claiming through the consignor, eventually may not come forward to take delivery of the goods for a variety of reasons - considerations of economy or supervening disability imposed by law etc. Therefore, in such cases to say that merely because the bill of lading is endorsed or the delivery

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order is issued, the consignor or his agent is absolved of the responsibility for payment (of **rates** or rent for services rendered w.r.t goods) would result in a situation that the BOARD would incur expenses without any legal right to recover such amount from the consignor and be driven to litigation for recovering the same from the consignee who did not take delivery of the goods with whom the BOARD had no contract of bailment and consequently no contractual obligation to pay the **'rates or rent'**.

39. Enquiry into the relationship between either the BOARD, the consignor of goods, the owner of the vessel and the steamer agent on one hand or the consignee and the BOARD on the other, in our opinion, is wholly irrelevant in examining the right of the BOARD to recover the amounts due towards the **rates or rent** for services rendered with respect to the goods. The right of the BOARD is unquestionable. **The only question is: from whom can the BOARD recover – we emphasise the question is not who is liable.** Depending on the nature of the relationship between the consignor and consignee, the liability may befall either of them.

40. On the other hand, in the light of the legal position declared by the Constitution Bench in **ROWTHER-I,** the 1st respondent is a sub-bailee of the goods bailed by consignor (bailor) to the ship-owner (bailee). The goods are bailed through the agent (steamer agent) of the bailee. The appellant is only a person claiming through the bailor, without any direct contractual relationship with the 1st respondent.

41. Title to the goods is irrelevant **even** in the cases of a bailment arising under a contract. Any person who is capable of giving physical possession of goods can enter into a contract of bailment and create bailment. Under Section 148 of the Contract Act, 'bailment', 'bailor' and 'bailee' are defined as under:

> "A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.
>
> Explanation.- If a person is already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes

A the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment."

It can be seen from the above that bailment is a contractual relationship and bailment can be created by any person who is in possession/custody of goods but not necessarily the owner of the goods. When the purpose B of bailment is accomplished the goods are to be returned or otherwise disposed of according to the directions of the person (bailor) delivering them.

42. Section 158 of the Contract Act stipulates the obligations of the bailor to pay the necessary expenses incurred by the bailee "for the C purpose of bailment". Section 158 of the Contract Act reads as under:

"Section 158. Repayment by bailor of necessary expenses. – Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor D shall repay to the bailee the necessary expenses incurred by him for the purpose of bailment."

The obligation of the bailee to return the bailed goods when the purpose of bailment is accomplished and the obligation of the bailor to pay the bailee "the necessary expenses incurred by him for the purpose E of the bailment" in our opinion would attend not only a bailment by contract but every kind of bailment.

43. If the bailor has such an obligation to pay the bailee, any person claiming through the bailor must necessarily be bound by such an F obligation unless the bailee releases such person from such an obligation. A consignee is a person claiming through the consignor (bailor). In the context of import of goods into India by ship, the consignees' rights are governed *inter alia* by Section 1 of the Bills of Lading Act, 1856.

1. Rights under bills of lading to vest in consignee or endorsee – G Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods herein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had H been made with himself.

44. It can be seen from the above that the 1856 Act enacts a fiction that the consignee to whom the property in the goods shall pass shall be "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself". Bill of lading is evidence of a contract[32] between the shipper (consignor) and the owner of the ship by which the owner of the ship agrees to transport the goods delivered by the consignor to a specified destination and deliver it to the consignee. Delivery of goods pursuant to a bill of lading creates a bailment between the shipper and the owner of the ship. Obviously the legislature knew that a consignee under a bill of lading is a 3rd party to the contract but intrinsically connected with the transaction and thought it necessary to specify the rights and obligations of the consignee. Hence, the fiction under the 1856 Act, that the moment the property in goods passes to the consignee, the liabilities of the consignee in respect of such goods would be the same as those of the consignor, as if the contract contained in the bill of lading had been made with the consignee.

45. The consequence is that the 1st respondent (sub-bailee) would be entitled to enforce its rights flowing from the Bailment between the ship owner and the 1st respondent against the consignee and recover expenses incurred by it in connection with the bailment from the consignee. The terms and conditions of the contract between the consignor or person claiming delivery of the goods are irrelevant for determining the right of the 1st respondent to recover its dues. The obligations/liability of the consignee is determined by the statute. But the said obligation is not exclusive to the consignee. The consignor (bailor) is not relieved of the obligation to pay by virtue of Section 158 of the Contract Act the expenses incurred by the 1st respondent. Nothing is brought to our notice to hold otherwise. At this juncture, we must point out that the declaration under Section 42(7)[33] absolving the owner of the ship and his agents is limited only to the obligations owed by the bailor to the consignee not to the sub bailor like the 1st respondent.

46. Section 59 of THE ACT, creates lien in favour of 1st respondent in respect of any goods and also authorises the 1st respondent to seize

[32] Called contract of affreightment

[33] Section 42 (7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.

A and detain the goods, it clearly makes a special provision. Under the Contracts Act, every bailee has no lien on the goods delivered to him. Such a lien is available only to limited classes of bailees specified under Section 171[34]. They are – bankers, factors, wharfingers[35], attorneys of a High Court and policy-brokers. It can be seen from Section 171 that only those specific categories of bailees have a right to retain goods bailed to them as security for the amounts due to them. No other category of bailee has such a right unless there is an express contract creating such a lien.

47. Section 59 of THE ACT, also expressly authorises the 1st respondent to seize and detain goods taken charge of by it. Parliament also invested the 1st respondent with the authority to sell the goods and appropriate the proceeds of sale under Section 63[36] of the ACT towards

[34] *Board of Trustees of the Port of Bombay & Ors.* v. *Sriyanesh Knitters*, (1999) 7 SCC 359.
Para 17. ... This section is in two parts. The first part gives statutory right of lien to four categories only, namely, bankers, factors, wharfingers and attorneys of High Court and policy-brokers subject to their contracting out of Section 171. The second part of Section 171 applies to persons other than the aforesaid five categories and to them Section 171 does not give a statutory right of lien. It provides, that they will have no right to retain as securities goods bailed to them unless there is an express contract to that effect. Whereas in respect of the first category of persons mentioned in Section 171 the section itself enables them to retain the goods as security in the absence of a contract to the contrary but in respect of any other person to whom goods are bailed the right of retaining them as securities can be exercised only if there is an express contract to that effect.

[35] For the sake of completeness in the narration it must also be mentioned that this Court held in (1999) 7 SCC 359 (at para 22) that a Board constituted under THE ACT is a wharfinger.

[36] **63. Application of sale proceeds** (1) The proceeds of every sale under section 61 or section 62 shall be applied in the following order-
(a) in payment of the expenses of the sale;
(b) in payment, according to their respective priorities, of the liens and claims excepted in sub-section (2) of section 59 from the priority of the lien of the Board;
(c) in payment of the rates and expenses of landing, removing, storing or warehousing the same, and of all other charges due to the Board in respect thereof including demurrage (other than penal demurrage) payable in respect of such goods for a period of four months from the date of landing.
(d) in payment of any penalty or fine due to Central Government under any law for the time being in force relating to customs;
(e) in payment of any other sum due to the Board.
(2) The surplus, if any, shall be paid to the importer, owner or consignee of the goods or to his agent, on an application made by him in this behalf within six months from the date of the sale of the goods.
(3) Where no application has been made under sub-section (2), the surplus shall be applied by the Board for the purposes of this Act.

various heads indicated thereunder without the need to file a suit[37] which are taken charge of by it in certain circumstances, details of which we have noticed earlier.

48. If the ACT authorises the 1st respondent to recover its dues by bailing the goods under bailment, in those cases where the consignee does not turn up to take the delivery of the goods within the time stipulated under Sections 61 or 62 of the ACT, to deny the right to demand and recover the amounts due from the consignee when he seeks delivery of the goods under bailment would be illogical and inconsistent with the scheme of the ACT.

Such right, in our view, undoubtedly enables the 1st respondent to claim various amounts due to it, from any person claiming delivery of the goods either the bailor or a person claiming through the bailor for the services rendered w.r.t. the goods. Denying such a right on the ground that the person claiming delivery of the goods acquired title to the goods only towards the end of the period of the bailment of the goods with the 1st respondent would result in driving the 1st respondent to recover the amount due to it from the bailor or his agent who may or may not be within the jurisdiction of the municipal courts of this country (by resorting to a cumbersome procedure of litigation).

The 1st submission is, therefore, rejected.

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[37] *Board of Trustees of the Port of Bombay & Others v. Sriyanesh Knitters*, (1999) 7 SCC 359.

"16. There is another aspect which is relevant. Section 171 of the Contract Act only enables the retention of goods as security. On the other hand in respect of current dues in respect of existing goods in their possession the Board not only has a lien under Section 59 of the MPT Act but it also has the power to sell the said goods and realise its dues by virtue of Section 61 of the MPT Act. The procedure for exercising this power of sale of the goods in respect of which the Board has lien is contained in the said section. **Before selling the goods no order of any court or other judicial authority is required.** On the other hand the general lien contemplated by Section 171 of the Contract Act only enables the retention of the bailed goods as a security. Their retention does not give any power to sell the goods, unlike the power contained in Section 61 of the MPT Act. If payment is not made by the consignee to the wharfinger, in a case where Section 171 of the Contract Act applies, the wharfinger can only retain the goods bailed as security and will have to take recourse to other proceedings in accordance with law for securing an order which would then enable the goods to be sold for realisation of the amounts due to it. It may in this connection, be necessary for the wharfinger to file a suit for the recovery of the amount due to it and Section 131 of the MPT Act clearly provides that such a remedy of filing a suit is available to the Board."

48A. Now, we deal with the second submission. The appellant claims that he is entitled to complete remission of the demurrage. According to the appellant, the facts of the case not only justify but also demand the exercise of the discretion conferred upon the 1st respondent under Section 53 of the Act to grant a complete remission of the demurrage in question. According to the appellant, the Government of India issued certain guidelines[38] dated 24.1.1992 which structure the discretion of the Port Trust in the matter of granting remission.

49. We notice that the text of the guidelines permit granting of remission upto 80 per cent of demurrage in appropriate cases. We also notice that the cap of 80 per cent is not absolute. The 1st respondent can even grant complete remission in appropriate cases.

(i) Admittedly, the 1st respondent granted remission to an extent of Rs.90,52,535.00 (approximately) out of the total claim towards demurrage of Rs.2,81,67,333.00.

(ii) The liability to pay demurrage arose because of the non-clearance of the goods from the 1st respondent's property for a considerable period of time.

(iii) The period could be divided into two phases:

Phase I before the point of time when appellant started claiming the right to take delivery;

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[38] It is not very clear from the record whether these guidelines were issued by the Government of India or guidelines framed by the 1st respondent. In the written submissions, the appellant describes the guidelines framed by the Government of India whereas under the judgment under appeal at para 24, it appears that the appellant's case before the High Court was that they were guidelines framed by the 1st respondent.

> "....He would submit that the guidelines framed by the BPT itself provides for remission asked for by the petitioners when the detention of the goods by the Custom was for bonafide operation of ITC formalities."

Per contra the case of the 1st respondent before the High Court regarding the guidelines appears to be

> ".....remission is granted on ex-gratia basis, that too, by exercising discretion on the basis of guidelines issued by the Union of India and adopted by resolution passed by respondent No. 1 along with Custom Department."

The High Court did not record any categorical finding in this regard except stating

> "47. In exercise of statutory powers under section 101 of the Major Port Trust Act guidelines for remission of demurrage charges are framed."

Delay in taking delivery is attributable purely to the failure of the original consignee. The appellant clearly knew or at least ought to have known, when he purchased the goods that the 1st respondent would demand demurrage. The appellant as a person claiming through the consignor is not entitled in law to claim any right of remission on the ground that he did not have any interest or title in the goods for such period.

AND

Phase II after the present appellant's right to take delivery of goods came into existence.

Such delay occurred because of the time taken in ensuring that the appellant complied with the various statutory obligations to import goods such as amendment of the IGM etc.

50. The fact that the appellant was not permitted to clear the goods because of the pendency of some proceedings initiated by the customs authorities by itself does not create a right of remission in favour of the appellant.[39] Though it may constitute a relevant circumstance for considering granting remission if the 1st respondent so chooses as a matter of policy. As a matter of fact, remission of a part of the demurrage was granted by the 1st respondent.

51. Now, we come to the submission that the respondent's decision to decline remission to the appellant is discriminatory because remission was granted in the case of a similarly situated consignee called Gilt Pack. Unfortunately, though the High Court noted the rival submission in the context of the allegation of discrimination, it did not record any conclusion on that count.

52. From the facts available on record, we are of the opinion that firstly, the cases of Gilt Pack and appellant are not identical. Gilt Pack was the case where the original consignee sold the goods to a third party on high seas even before their arrival into India. It so transpired that the purchaser did not have an appropriate license under the relevant law to import the goods. In view of the said problem, the goods were detained for some time and eventually the original consignee himself cleared the goods[40]. It is in the said circumstances Gilt Pack was granted remission. We are not concerned with the question whether the discretion was

[39] *See* ***International Airports Authority of India v. Grand Slam International,*** (1995) 3 SCC 151

[40] The full factual background as to how it all happened is not relevant for our purpose.

A appropriately exercised in the case of Gilt Pack. We are only on the question whether the facts of Gilt Pack and the appellant herein are identical.

53. However, we must make it clear that the authority of the 1st respondent to grant or decline remission of any amount due towards any B rate payable under THE ACT must be based on rational consideration and a sound policy. Such a requirement is inherent in the fact that 1st respondent is a statutory body discharging important statutory obligations. 1st respondent could not bring anything on record to our notice which demonstrates the reasons for declining remission as claimed by the appellant nor any clear policy of the respondent which regulates the C discretion. In the circumstances, we deem it appropriate to set aside the decision of 1st respondent dated 16.09.1995 in declining the remission and leave it open to the respondent to take appropriate decision on the application duly recording the reasons for such decision.

54. The appeal is accordingly allowed in part. The impugned D judgment is set aside. There shall be no order as to costs.

Kalpana K. Tripathy Appeal partly allowed.