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SUN EXPORT CORPORATION AND ANR.

v

BOARD OF TRUSTEES OF THE PORT OF BOMBAY

OCTOBER 23, 1997

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[DR. A.S. ANAND AND K. VENKATASWAMI, JJ.]

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Bombay Port Trust Act 1879 : S.3(5) /Major Port Trusts Act 1963 : S.2(0)—Importer acting as agent of the consignee and responsible for custody of goods—Held, it was owner of the goods in question and liable to pay charges to the Port Trust.

Major Port Trusts Act, 1963 : S.63—Goods confiscated by Customs Authority—Held, not available for appropriation towards Port Trust dues.

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Appellant No. 1, a sole proprietary concern of appellant No. 2, imported certain consignment in the years 1973-74, against two import licences held by an engineering firm. The said firm had obtained from the Joint Controller of Imports and Exports two letters of authority whereunder the first appellant was to clear the goods in respect of those two licences from the warehouse at the docks. That, however, was not done. By its order made in February 1976

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the Collector of Customs found that the said goods were liable to confiscation under section 111(d) of the Customs Act, and the appellant was given option to redeem them on payment of Penalty.

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Since the goods were not recovered from the warehouse, the respondent Port Trust served a notice on the first appellant in April 1976 calling upon it to do the needful and pay the dues of the Port Trust. As the goods had not been cleared, in October 1976 the respondent informed first appellant of the demurrage charges upto the date of confiscation and called upon it to remit the said amount.

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The first appellant having failed to pay the charges, the respondent instituted a suit in the High Court in November 1979 for recovery of its dues with interest from the date of suit till realisation. The appellants resisted the suit. It was contended for them that since they were not importers or owners of the goods they were not liable for the wharfage and demurrage charges, that the engineering firm being the licence holders, who had imported the said goods were the owners of the goods within the meaning of the expression

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'owner' under the Bombay Port Trust Act as well as the Major Port Trusts Act, and as such that firm alone was liable to pay the dues of the Port Trust and since the respondent Port Trust had failed and neglected to recover their dues from the said firm, they were stopped from claiming demurrage and other charges from the appellants. The Single Judge held that the appellants were not the importers and/or owners of the goods and the respondent could not recover dues from them. The Division Bench in appeal decreed the suit with 12% interest per annum from the date of the suit till realisation of the amount. A B

It was contended on behalf of the appellant that the letters of authority issued in their favour did not create any privity between them and the respondent since those were issued under the Import and Export Policy. That the holders of the import licences, or the named consignee, the bank, could only be fastened with the liability to pay demurrage charges because the appellants were not the owners of the goods, and that it was open to the respondent to recover the demurrage charges by sale of the goods, and not having done that, the respondent could not fasten the liability on the appellants. C D

For the respondent it was contended that the first appellant had at no point of time informed them that it was acting for and on behalf of the holders of the import licences only, that since the appellants were acting as agents for the consignee and were therefore responsible for the custody of the goods and their clearance from the warehouse and since they had and failed to clear the goods and remove them from the warehouse they could not escape their liability to pay the dues claimed. E

Dismissing the appeal, the Court F

HELD : 1. The liability of the appellants has been correctly fastened by the Division Bench of the High Court. It was their obligation to clear the goods from the warehouse of the respondent and since they had failed to do so, they were liable to pay charges to the Port Trust. [690-F]

2. The definition of the expression 'owner' in S.3(5) of the Bombay Port Trust Act and S.2 of the Major Port Trusts Act goes to show that it includes within its ambit a 'consignee' as well as an 'agent for the custody of the goods' in question. In the instant case, in the Bill of Lading against the column of 'consignee' it is stated 'order of the Indian Overseas Bank' and the party to be notified is shown as appellant No. 1. The said bank had made an H

A endorsement in favour of appellant No. 1 which directed that the consignment in question be delivered to appellant No. 1. It was appellant No. 1. who had appointed clearing agents to obtain customs clearance in respect of the consignment. Appellant No. 1. had filed the Bill of Entry for clearance of the goods. It was appellant No. 1. which had been served with the show cause notice by the customs authorities. The order of confiscation was also addressed to

B appellant No. 1. by them. The consignment bore the mark containing the initials of appellant No.1. Again, it was appellant No.1 who had opened the letter of credit and also incurred expenses and accepted its liability to the bank. It had also invested considerable sum on the suit consignment between the years 1974-76. Appellant No.1 would, therefore, squarely fall within the

C definition of an 'owner' both under the Bombay Port Trust Act as also under the Major Port Trusts Act, more particularly since it had secured an endorsement from the consignee on the Bill of Lading with a view to obtain custody of the consignment thereby making it an 'agent for the custody' of the consignment. That being so, the liability to pay demurrage and other charges to the Port Trust would squarely lie on the party who was obliged to

D remove the goods from the warehouse but had failed to do so. [690-B-E]

3. The obligation to pay the charges of the Port Trust till the confiscation of the goods is that of the party which had the duty to remove/ receive the goods and had failed to do so. In the instant case, it was the

E appellants who had acted as holders of the letters of authority and were the licensee's agents for the clearance of the consignment from the customs and entitled to receive the goods which they had failed to receive and clear. They could, therefore, be fastened with the liability to pay the charges by way of demurrage etc. to the Port Trust. [690-H; 691-A]

F 4. The goods had stood confiscated by the Customs Authority, vide order dated February 28, 1976 under S. 111 (d) of the Customs Act, 1962 read with S. 3(2) of the Import and Export (control) Act, 1947. The option to redeem the goods on payment of fine/penalty in lieu of such confiscation under the provisions of S.125 of Customs Act 1962 was to be exercised by the appellants,

G to whom notice was issued by the Customs Authority to redeem the goods. That option was never exercised. Since the goods stood already confiscated the same were not available to the Port Trust for appropriation towards their dues. Section 63 of the Major Port Trusts Act, 1963, in the facts and circumstances of the case does not come into play at all. [691-C-E]

H *Board of Trustees, Bombay Port v. Srivansh Knitters, AIR (1983) Bom.*

88, distinguished.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 655 of 1994.

From the Judgment and Order dated 9/10.2.93 of the Bombay High Court in A. No. 1375/90 in Suit No. 394 of 1979.

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Parag P. Tripathi, Ms. Rakhi Ray and Ms. Bina Gupta for the Appellants.

R.F. Nariman and Mrs. A.K. Verma for the Respondent for M/s. J.B. Dadachanji & Co.

The Judgment of the Court was delivered by

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DR. ANAND, J. Appellant No. 1, a sole proprietary concern of appellant No. 2 imported 10 cases of stainless steel tubes in July, 1974. The import of the consignment was effected against two Import Licences dated 13th November, 1973 and 1st February, 1974 which were held by a firm running under the name and style of M/s. Laxmi Engineering Company. District Sonapat, Haryana. The said firm obtained from the Joint controller of Imports and Exports two letters of authority dated 20th February, 1974 whereunder the first appellant was to clear the goods in respect of those two licences. The consignment landed by vessel s.s "JALA VEERA" on July 26/27, 1974 at Indira Docks. The consignment was to be cleared by the first appellant from the warehouse at Indira Docks. That, however, was not done. The Collector of Customs vide his order dated 28th February, 1976 found that the goods covered by the consignment were liable to confiscation under section 111(d) of the customs Act, 1962 for various reasons detailed in the order. Option to redeem the goods was, therefore, given to the appellant on payment of Rs. 2,00,000 as penalty.

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Since, the goods were not recovered from the warehouse at Indira Docks, the respondent, Bombay port Trust authorities, served a notice on appellant No. 1, on April, 19, 1976, informing it about the non-clearance of the consignment and calling upon it to do the needful and pay the dues of the port Trust. Appellant No. 1 informed the port Trust on May 24, 1976 that the Bill of Entry was being completed and that the goods would be cleared and at time of clearance, charges would also be paid. Since, the goods had not been cleared, on October 6, 1976, the port Trust informed respondent No. 1 that demurrage charges amounting to Rs. 1,58,545.10 Ps. were due "upto the date of confiscation" and called upon appellant No.1 to remit the said

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A amount, Since, there was no response, the port Trust sent a reminder to appellant No.1 on November 10, 1976 also for remitting the due amount. On December 3, 1976, appellant No.1 informed the Port Trust that it had merely opened a Letter of credit and that the licence holder was liable to pay the costs and charges, who had failed to do so and 45 days' time was, therefore, sought by appellant No.1 to arrange necessary finance for payment of the dues. Since, appellant no. 1 failed to pay the charges and dues, the Port Trust instituted Suit No. 394 of 1979 on the Original side of the High Court of Judicature at Bombay on November 26, 1979 for recovery of Rs. 1,58,545.10 with interest thereon @12% per annum from the date of the said suit till realisation. Appellants resisted the suit and various pleas were raised. It was claimed that the suit was barred by limitation. On merits the contention of the appellants was that since they were not the *importers* or *owners* of the goods, they were consequently not liable for the wharfage and demurrage charges. It was asserted that M/s. Laxmi Engineering Company of Haryana, being the licence holders for the import of stainless steel tubes, who had imported the said goods were the owners of the goods within the meaning of the expression "owner" under the Bombay Port Trust Act as well as under the Major Port Trusts Act, 1963 and as such that firm alone was liable to pay the dues of the port trust and since the Port Trust had failed and neglected to recover their dues from M/S Laxmi Engineering Company they were stopped from claiming demurrage and other charges from the appellants. From the pleadings of the parties, the following issues were framed :

"1. Whether the suit is barred by the law of limitation?

2. Whether the defendants were the importers and /or owners of the goods mentioned in para 4 of the plaint, as alleged in para 6 of the plaint?

3. Whether the plaintiffs were not entitled to take charge of the consignment mentioned in the plaint except on the request of the owners of the goods as provided under the Major Port Trusts Act?

4. Whether the defendants were under an obligation or were bound to apply for and take delivery of the said goods and to clear the same within seven clear days as alleged in paras 6 and 9 of the plaint?

5. Whether the defendants were bound and liable to pay wharfage, demurrage and other charges as alleged in para 6 of the plaint or at all?

6. Whether the plaintiffs are entitled to claim demurrage and other charges in respect of the said goods for the period subsequent to the period of one month from the date on which the goods were taken in their custody that is for the period subsequent to the 30th August, 1974? A

7. Whether the plaintiffs abandoned or waived or forfeited their claim in respect of their dues and are estopped from making a claim in respect thereof against the defendants and /or Laxmi Engineering Co., as alleged in para 8 of the written statement? B

8. Whether the defendants are bound and liable to pay to the plaintiffs a sum of Rs. 1,58,545.10 as per exhibit 'B' to the plaint or any part thereof either with interest at the rate of 12% per annum or any other rate? C

9. To what reliefs are the plaintiffs entitled?"

While the Port Trust led no evidence, the appellants examined Shri Badri Prasad Chaudhary, constituted attorney of appellant No. 2. The parties also produced various documents in support of their respective cases. On a consideration of the evidence on the record, the learned Single Judge concluded that the suit filed by the Port Trust was not barred by limitation. However, on merits, the learned Single Judge held that since the appellants were not the importers and/or owners of the goods covered by the consignment, the Port Trust could not recover the dues from the appellants. It was admitted before the learned trial Judge that there was no dispute about the quantum of the claim raised by the Port Trust on account of various charges. Aggrieved by the decision of the trial Judge, the Port Trust filed an appeal before the Division Bench of the High Court. The Division Bench allowed the appeal on 9/10th February, 1993 and setting aside the judgment and decree of the trial court, decreed the suit filed by Port Trust with 12% interest per annum from the date of the suit till the realisation of the amount of Rs. 1,58,545.10 ps. The appellants were also directed to pay costs of the suit. The decision of the Division Bench dated 9/10th February, 1993 is assailed through this appeal by special leave. D
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We have heard Mr. Parag P. Tripathi, learned counsel for the appellants and Mr. R.F. Nariman, learned Senior counsel appearing for the Port Trust authorities.

For the purpose of this appeal arguments were confined by learned H

A counsel for the appellants to the findings on Issue Nos. 2, 8 and 9 only.

Mr. Tripathi submitted that the letters of authority issued in favour of the appellants did not create any privity between the appellants and the port Trust because those were issued under Import and Export Policy and were not intended to govern any relationship of the appellants with the Port Trust.

B It was argued that Laxmi Engineering Company or the named consignee i.e. Indian Overseas Bank, could alone be fastened with the liability to pay 'demurrage' charges because the appellants were not the "owners" of the goods and that it was also open to the Port Trust to recover the demurrage charges by sale of the goods and not having done that the Port Trust could not fasten the liability on the appellants.

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In response, Mr. Nariman submitted that not only did the appellant No. 1 at no point of time inform the Port Trust that it was acting for and on behalf of Laxmi Engineering Company only but even otherwise the appellants were acting as agents for the consignee and were therefore responsible for the custody of the goods and their clearance from the warehouse and since they failed to 'clear' the goods and 'remove' the same from the warehouse, they could not escape from their liability to pay the claimed dues to the Port Trust.

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E With a view to appreciate the rival contentions raised at the Bar, it is first necessary to notice certain admitted positions.

A perusal of the Bill of Lading, Ext. 'B' reveals that Atlantic Metal Company Limited were the shippers. Against the column of "consignee" it is stated "order of the Indian Overseas Bank" and the party to be notified is shown as appellant No. 1. It is also admitted that the Indian Overseas Bank had made an endorsement in favour of appellant No.1 which directed that the consignment in question should be delivered to appellant No. 1. After the endorsement was made by Indian overseas Bank in favour of appellant No. 1, M/S. C.C. Shah & Sons, clearing agents, were appointed by appellant No. 1 to obtain customs' clearance in respect of the consignment. It is also admitted that notice regarding confiscation and option of redemption on payment of penalty was issued by the Customs Authority to appellant No. 1. That the appellants were acting as agents for the consignee is not denied. It is also admitted that at no point of time did the appellants inform the Port Trust about the liability of the licensee, Laxmi Engineering or that they were acting only on behalf of the said firm till the suit was filed. So far as the quantum

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of charges is concerned, there is no dispute about its correctness either. A

Thus from the admitted facts it would be seen that for all intent and purposes the rights which vested in the original consignee stood transferred in favour of the endorsee and the original consignee could thereafter exercise no rights in respect of the consignment, without cancelling the endorsement. A reference to the statement of Shri Badri Prasad Chaudhary, the constituted attorney and husband of appellant No. 2, also goes to show that it was appellant No.1 who had opened the letter of Credit and it had also incurred expenses and accepted its liability in so far as the Bank is concerned. The witness admitted that after the steamer had arrived in Bombay in July, 1974, payments were made by the first appellant and the Bank debited about Rs. 2 to 2-1/2 lakhs to the account of appellant No.1. He went on to add that apart from the said sum of Rs. 2 to 2-1/2 lakhs, the appellant No.1 had also invested a sum of about Rs. 6 lakhs in respect of the suit consignment between the years 1974 and 1976. The witness further admitted that the consignment bore the mark containing the initials of appellant No.1 He also admitted that appellant No. 1 had filed the Bill of Entry for clearance of the goods and that it was appellant No. 1 who had been served with the show cause notice by the customs authorities. The witness went on to admit that the order of confiscation was also addressed to appellant No.1 by the customs authorities. Mr. Nariman, on the basis of the evidence of this witness and the documents on the record, submitted that appellant No.1 was the "consignee" or the "owner" or the "agent" for the goods in question and, therefore, the Port Trust was justified in fastening the liability of recovering demurrage charges from it. B C D E

Section 3(5) of the Bombay Port Trust Act defines an "owner" as; F

" "Owner" when used in relation to goods includes any consignor, consignee, shipper or agent for the sale or custody of such goods; and when used in relation to any vessel or any aircraft making use of the port includes any part-owner, charterer, consignee or mortgagee in possession thereof." G

Section 2(o) of the Major Port Trusts Act defines an "owner" in the following terms : H

" "Owner", (i) in relation to goods includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods; and (ii) in relation to any vessel or any aircraft making use of

A any port, includes, any part-owner, charterer, consignee, or mortgage in possession thereof.”

Bare reading of the definition of the expression “owner” under both the Acts, goes to show that the expression includes a “consignee” as also an “agent for sale or custody” of such goods. Thus, both under the Bombay Port Trust Act as well as under the Major Port Trusts Act, the expression “owner” includes an “agent for the custody of such goods”. Therefore, irrespective of the question whether the expression “owner” could only imply the title holder in the goods as canvassed by Mr. Tripathi, from definitions noticed above it follows that the expression “owner” would include within its ambit a “consignee” as well as the “agent for the custody of the goods” in question. We are in agreement with the view of the Division Bench of the High Court that on the endorsement made by the “consignee” on the Bill of Lading, the appellant No.1 became the “consignee” and in view of the Letters of authority issued to it, appellant No. 1 was obliged to clear the goods as an “agent”. Appellant No. 1 would therefore squarely fall within the definition of an “owner” both under the Bombay Port Trust Act as also under the Major Port Trusts Act, more particularly since it is not disputed that appellant No. 1 had secured an endorsement on the Bill of Lading with a view to obtain custody of the consignment. It is, therefore, not available to Mr. Tripathi to contend that the appellants could not be considered even to be the “agents for the custody” of the consignment. This being the fact situation, the liability to pay demurrage and other charges to the Port Trust would squarely lie on the party who was obliged to remove the goods from the warehouse but failed to do so.

The expression “demurrage” has not been defined under the Port Trusts Act. In the context of the goods remaining in the wharfage, it implies the charges which the Port Trust can levy at a particular rate if the goods remain on the docks beyond a specified time. The Port Trust with a view to recover those dues would ordinarily have a lien on the goods and can refuse to deliver the goods till the demurrage charges are paid. This, however, presupposes that the Port Trust continues to hold the goods, but where the goods have been confiscated by the Customs Authority, it cannot be said that the Port Trust had any hold over those goods after their ‘confiscation’. The obligation to pay the charges of the Port Trust, till the confiscation of the goods as already observed, that of the party which had the duty to remove/receive the goods and had failed to do so. In the instant case it was the appellants, who admittedly had acted as holders of the Letters of authority

and were the licensee' agents for clearance of the consignment from the customs and entitled to receive the goods which they failed to receive and clear. They could therefore be fastened with the liability to pay charges by way of demurrage etc. to the Port Trust. A

We do not find any merit in the submission of Mr. Tripathi that the Port Trust could have put the goods in question to sale* to off-set the demurrage since they had a lien over those goods before making any claim on the appellants. The goods, as already notice, stood confiscated by the Customs Authority vide order dated 28th February, 1976 under Section 111(d) of the Customs Act, 1962 read with Section 3(2) of the Import and Export (control) Act, 1947. The option to redeem the goods on payment of fine/penalty of Rs. 2 lakhs in lieu of such confiscation under the provisions of Section 125 of the Customs Act, 1962 was to be exercised by the appellants, to whom notice was issued by the Customs Authority within a fortnight to redeem the goods. That option was never exercised. Since, the goods stood already *confiscated*, the submission that those goods could have been sold to off-set the demurrage charges is fallacious. The goods confiscated by the Customs Authority were not available to the Port Trust for appropriation towards their dues. Section 63 of the Major Port Trusts Act, 1963, in the facts and circumstances of this case, does not come into play at all. In so far as *Board of Trustees. Bombay Port v. Srivansh Knitters*, AIR (1983) Bombay 88 on which reliance is placed by learned counsel for the appellants is concerned, that judgment has been considered and rightly distinguished by the Division Bench of the High Court. B C D E

Since, the obligation to clear the goods was that of the appellants and they had failed to clear those goods, they cannot escape their liability to pay the charges to the Port Trust including demurrage. The liability of the appellants in the facts and circumstances of the case, has been correctly fastened by the Division Bench of the High Court. F

In view of what we have said above, we find that the impugned judgment of the Division Bench of the High Court does not call for any interference. The appeal, therefore, fails and is dismissed, No costs. G

P.S.S.

Appeals dismissed.