

(2020) 12 BOM CK 0059

Bombay High Court

Case No: Appeal From Order (ST) No.93898 Of 2020, Interim Application (ST) No.93899 Of 2020

Anax Industries Pvt. Ltd

APPELLANT

Vs

Micro Logistics (I), Pvt. Ltd

RESPONDENT

Date of Decision: Dec. 22, 2020

Acts Referred:

- Code Of Civil Procedure, 1908 - Order 43 Rule 1(2)
- Commercial Courts Act, 2015 - Section 13(1A)
- Indian Contract Act, 1872 - Section 60, 170, 171

Hon'ble Judges: Sandeep K. Shinde, J

Bench: Single Bench

Advocate: Jaydeep Deo, Arjun Amanchi

Final Decision: Disposed Of

Judgement

Sandeep K. Shinde J

1. Heard. With consent of the learned counsel appearing for the parties, matter is taken up for final hearing forthwith.

2. Appellants/plaintiffs instituted commercial suit No.12 of 2020 for damages and pending suit, sought mandatory injunction seeking release of bills of

lading illegally withheld by the defendants-freight forwarding agents, so as to preserve the cargo, before it loses utility. The learned District Judge-2,

Pune declined the mandatory relief vide order dated 10th August, 2020 and thus, this appeal is preferred under Section 13(1-A) of the Commercial

Courts Act, 2015 read with Order 43 Rule 1 (2) of the Code of Civil Procedure, 1908.

3. Plaintiff's case is;

Plaintiff is a private limited company, engaged in the business of manufacturing core board and high strength paper conversion products. Defendant is one of the group companies of SJA group, a freight forwarding agent. That since incorporation, plaintiffs have been exporting products to almost 36 countries and its exports consignments were handled by defendants. It is plaintiff's case that freight forwarding agent is also responsible for arranging over-seas customs clearance and inland haulage of the containers as per the order.

FIRST CONSIGNMENT:

4. Plaintiffs claim that on 27th April, 2020, core board paper weighing 2,22,334 metric ton was shipped in nine containers from factory of the plaintiffs.

Port of loading was Nhava-sheva and port of discharge was Bunder Abbas in Iran. These nine containers reached at port of destination, on 3rd May,

2020. Whereupon defendants raised two invoices nos. 17 and 18, towards ocean freight charges for Rs.11,66,874/- and Rs.5,900/-. However,

defendants declined to release the bills of lading, on account of outstanding dues. Plaintiffs, therefore, on 22nd May, 2020, paid Rs.8,65,000/- to the

defendants. After receiving Rs.8,65,000/-, defendants released bill of lading and issued seaway bill dated 29th April, 2020, which enabled consignee, to

release the goods from the port at Iran. Plaintiffs would contend that since goods were not released within free period of 14 days, consignee was

required to pay demurrage charges, US dollars 2340 i.e., Rs.1,80,297/-. Plaintiffs would claim that its customers demanded the demurrage charges and

accordingly, plaintiffs raised credit note in favour of them for Rs.1,80,297/-.

SECOND CONSIGNMENT:

5. It is the plaintiff's case that next consignment of 72,666 MT of core board paper in three containers left Nhava-sheva port on 29th April, 2020 and

reached the port of destination, i.e., Abbas bundar at Iran on 8th May, 2020. Towards ocean freight charges of three containers, defendants raised

two invoices on 17th June, 2020, i.e., nearly after a month and half for Rs.4,35,000/-.

6. Subject dispute relates to second consignment, i.e., three containers which though reached port of delivery on 8th May, 2020, bills of lading were not

released and withheld illegally by the defendants, even after paying freight charges.

7 It is plaintiffss case that as per the prevailing practice, defendants were required to procure bills of lading from carrier and give it to shipper (plaintiffs.

to enable shipper to forward it to its customers over-seas to enable them to release the goods. However, the defendants refused to release the bills of

lading under the pretext of past dues. Plaintiffs, therefore, paid Rs.4,35,000/- to the defendants on 30th May, 2020, but in spite of payment, defendants

declined to release the the bills of lading. Defendants infact after receiving Rs. 4,35,000/- subjected release of consignment on two conditions :

(i). additional shipment business;

(ii). payment of Rs.20,00,000/- towards past dues

8.Plaintiffs would assert that, in ordinary course of business, original bill of lading reaches consignee in time to avoid liability towards the demurrage or

detention charges. However, though the second consignment had reached the port of destination on 8th May, 2020 and though Rs.4,35,000/-were paid

on 30th May, 2020, bills of lading were not released. Resultantly, till date, consignment is lying at the port of destination. It is thus, asserted that the

defendants cannot take disadvantage of their own wrong and therefore are liable to release consignment and pay demurrage charges.

9. Plaintiffs stated that core board paper is having limited life and if goods are not taken out from the containers, same are likely to loose its utility and,

therefore, it is just necessary that goods are immediately released from the port of destination. That if the goods are allowed to remain inside the

container during pendency of the suit, the purpose of fling suit and seeking relief would be frustrated. Plaintiffs stated that defendants cannot take

disadvantage of its own wrong and, therefore, liable to make good loss caused to plaintiffs and its customers in Iran towards demurrage and detention

charges or any other charges, which the plaintiffs and consignee may have to pay to get the containers released. Under these circumstances, plaintiffs

have fled suit seeking declaration that the defendants have committed breach of contract and thus, withholding bill of lading is illegal and void-ab-initio.

That due to illegal and irresponsible act of withholding bill of lading from 8th May, 2020 in respect of three containers, customers have lost confidence

in the plaintiffs, who have informed the plaintiffs that they will not do any business with the plaintiffs in future. Therefore, besides, seeking declaration

that defendants have committed breach of contract by withholding bill of lading, plaintiffs are also seeking declaration that defendants are liable to pay

sum of Rs.1,80,297/- with interest @ 24% p.a. towards the demurrage and detention charges (towards first consignment. and damages of

Rs.1,25,00,000/- per financial year including financial year 2020-21 and every financial year thereafter till disposal of the suit, towards damages for loss

of business and loss of profit in relation to its customers in Iran. Pending suit Plaintiffs are seeking directions to the defendants to release the bill of

lading or sea-way bills vis-a-vis 72666 MT of core board papers now lying at Abbasbunder in Iran in three containers without payment of any

detention/demurrage charges by the plaintiffs or its customers.

10. Pending suit, plaintiffs sought relief of mandatory injunction seeking directions against the defendants to release three containers lying at freight

container station, Abbasbunder, Iran. Trial court declined the relief and therefore this Appeal.

11. Submission of the plaintiffs, is therefore, two fold; that second consignment reached the port of destination on 8th May, 2020. Thereafter, plaintiffs

paid Rs.4,35,000/- to the defendants on 30th May, 2020 with a clear understanding that this amount would be appropriated towards freight charges for

three containers. In spite of receiving Rs.4,35,000/-, defendants refused to release bills of lading. Counsel would submit, this payment was made in

view of the clear understanding arrived at between the parties as is evident from WhatsApp messages exchanged between Mr. S.M.Nagar

(representative of the plaintiffs. and Mr. Rajan Shah (representative of the defendant..

12. Defendants refuted plaintiffs claim on the following grounds:

(a). Though invoices for ocean freight charges for three containers were raised on 17th June, 2020 for Rs. 4,35,000/-, plaintiffs have not paid the charges till date;

(b). That Rs.4,35,000/- paid on 30th May, 2020 were adjusted against dues in running account as per the practice;

(c). In absence of such "other circumstances" and or of intimation of appropriation from the plaintiffs, while paying Rs.4,35,000/-, it was appropriated towards subsisting lawful dues;

(d). That defendants being bailee has had right to retain the three containers / shipments until due remuneration for the services rendered is received.

13. Thus, it appears defendants have exercised "right to retain goods" in terms of section 170 of the Indian Contract Act, 1872; and "right to appropriate" Rs.4,35,000/- against debt, in absence of specific intimation envisaged under Section 60 of the Indian Contract Act, 1872.

14. Before appreciating rival contentions let me reproduce the provisions of Sections 60, 170 and 171 of the Indian Contract Act, 1872;

"60. Application of payment where debt to be discharged is not indicated .- Where the debtor has omitted to intimate and there are no other

circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and

payable to him from the debt r, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."

"170. Bailee's particular lien.- Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the

exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he

receives due remuneration for the services he has rendered in respect of them."

"171. General lien of bankers, factors, wharfingers, attorneys and police-brokers. - Bankers, factors, wharfingers, attorneys of a High

Court and police-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to

them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that

effect."

15. Thus, questions, I am called upon to answer are;

(i.). Whether defendants being freight services agents, have right to retain shipment i.e. goods bailed, for not receiving the ocean freight charges in terms of Section 170 of the Indian Contract Act, 1872?

(ii). Whether defendants were justified in appropriating Rs. 4,35,000/- made on 30th May, 2020 against past dues?

(iii). Whether, while making payment of Rs.4,35,000/- on 30th May, 2020, "attendant circumstances", were indicating that this payment was

towards ocean freight charges for three containers, which reached port of delivery on 8th May, 2020?

(iv.) Whether plaintiffs have made out prima facie case and in whose favour balance of convenience tilts and whether plaintiffs would suffer irreparable loss if the injunction is refused?

16. In this case, it is undisputed fact that since plaintiffs incorporation, its export consignments have been handled by the defendants as a freight

forwarding agents. Plaintiffs ledger account (1.7.2019 to 2. 7.2020. shows, it is running account, i.e., payments were made to the defendants towards

services rendered at convenient intervals subject to final settlement of accounts.

17. Here first consignment of nine containers reached the port of load on 27th April, 2020 and reached the port of destination on 26th April, 2020. On

the next day, defendants raised invoices towards ocean freight for nine containers, i.e., on 27th and 28th April, 2020, in all for Rs.11,72,774/-.

18. Though the three containers (second consignment. reached the port of destination on 8th May, 2020, defendants have not released bills of lading till

date and therefore, M/s Good Rich Maritime Pvt. Ltd. shipper liner called upon the plaintiffs to clear the shipment and further inform that till 10th

October, 2020, shipment has accrued demurrage and detention charges Rs.9,09,000/-.

19. Evidence on record shows following payments were made by the plaintiffs to the defendants from March 2020 till June, 2020;

Submission of the plaintiffs is that second consignment reached the port of destination on 8th May, 2020 and thereafter, plaintiffs paid Rs. 4,35,000/-on

30th May, 2020 towards its freight charges whereupon defendants agreed to release the consignment. This, agreement-a circumstance is discernible

from the messages exchanged between Mr. S.M. Nagar (representative of the plaintiffs. and Mr. Rajan Shah (representative of the defendants.. Thus,

submitted that messages exchanged establishes the fact that defendants had agreed to release bills of lading of second consignment soon after, receipt

of Rs. 4,35,000/-. To appreciate the arguments messages exchanged between the plaintiffs and the defendants are reproduced herein under;

As discussed, I would also request you to kindly plan to release the remaining 3 B/Ls tomorrow. I am trying to release the remaining

Rs.4.35 Lakhs out of the committed Rs. 13 Lakhs

Thanks once once again! My remittance of Rs. 4.36 Lakh will happen either 1 as te today or tomorrow,,,

Kindly arrange for release as discussed!.

Regards!.. Nagar

cc: Sh Sudhir Pendse

[29/05/20, 7:20:02 PM] S N Nagar : Sir, awaiting your confirmation!.

Regards

[29/05/20, 7:56:25 PM] Rajan Micro 2 : You have not transfer any money

[29/05/20, 8:31:32 PM] S N Nagar : Yes Please!. It will be done

tomorrow!. The

remaining Rs. 4.35 Lkh!. kindly get the remaining 3 B/Ls!. Regards!.

[30/05/20, 2:18:35 PM] S N Nagar : image omitted

[30/05/20, 2:19:47 PM] S N Nagar : Sir, Payment made !.. please see attached screen

shot...kindly process the remaining 3 B/L please! Regards!.. Nagar

[01/06/20, 2:37:57 PM] S N Nagar : Good afternoon Sir!. Hope you are getting thereafter B/L released for 3 containers of Iran!. We had made the payment to you as

[01/06/20, 2:41:46 PM] Rajan Micro 2 : Sorry sir payment not as per our agreement you have misunderstood kindly check with bharat.

[01/06/20, 2:42:06 PM] Rajan Micro 2 : will cal u after one hour

[01/06/20, 2:44:07 PM] S N Nagar : Please call

[02/06/20, 11:08:52 AM] S N Nagar : Good morning! I was waiting for your call!

Hope you are releasing the 3 B/Ls today!.. Regards

[02/06/20, 11:14:53 AM] Rajan Micro 2 : Sorry sir we will not be able to do it unless we have some more payment and shipment in pipeline

this our business policy from beginning. Sir I can not risk open credit with you hope you will understand. Send me your payment plan sir.

Will be able to speak only after 2pm.

[03/06/20, 11:03:50 AM] S N Nagar: Good morning Sir. I await your call & update

on the 3 B/L of Iran. Kindly revert. Regards.. Nagar

[03/06/20, 11:08:44 AM] Rajan Micro 2 : Gud mrng kindly go through my yesterday msg

it is very clear.

[03/06/20, 11:20:04 AM] S N Nagar: Sir, requesting to release the 3 B/L.

Rest all

we can clear/ discuss. Regards

[03/06/20, 11:33:41 AM] Rajan Micro 2: Sir sorry every time we discuss. My stand is very very very clear I can not give you clean credit

without having any shipment in my hand or other options you have to clear my entire out standing (which I know is not possible). Any way

as you have only mentioned few days back your export shipments are starting in this week so let's wait till then. I am assuring you once

new chtrs are stuff and reached the port for export we will release this B1 ALONG WITH MINIMUM PAYMENT OF 20 LACS. This are my

two requirements sir. I have always supported your company and trusted & respect your commitment but we are business not exchanging

services/ money on personal relationships. Hope sir you understand. You should understand despite all this we release 9cntrs B1 just to

help you out(from the beginning I was not in favour and against our business policy) request you not to take too much advantage of

relationship.

20. What could be gathered from these messages is that; Mr. S.M. Nagar (representative of the plaintiffs. on 28th May, 2020 requested Mr. Rajan

(representative of the defendants. to release three bills of lading and assured payment of Rs. 4,35,000/-, out of committed Rs. 13,000,00/-. On 29th

May, 2020, Mr. S.M. Nagar again requested to release bills of lading. Defendants in reply just enquired about the payment, since not received by them

on 29th May, 2020 and said nothing more. On 30th May, 2020, Rs. 4,35,000/- were credited in the books of defendants. However, bills were not

released. Thus, on 1st June, 2020, Mr. Nagar once again, requested Mr. Rajan Shah to release bills of lading, however, he declined to release the bills.

Defendant's message of 3rd June, 2020 suggests that for the first time release of consignment, was made subject to two conditions. The first condition

was that plaintiffs would get more business of shipment to the defendants and second that plaintiffs would pay Rs. 20,000,00/- on account towards

outstanding dues.

21. Thus, in consideration of, the facts of the case, messages exchanged, its reasonable construction, coupled with the fact that parties were following

and maintaining 'on account payment' practice, since long, in my view, Rs.4,35,000 paid by the plaintiffs to the defendants were towards sea

freight charges for three containers. One more circumstance emerged on record, is that invoices for second consignment were raised nearly after a

month and half, i.e., on 17th June, 2020. This is unusual departure from the prevailing practice. No reasons are coming forth for such a departure or

delay in raising the invoices. In fact, defendants in the prevailing circumstances were expected to raise invoices soon after the second consignment

reached port of delivery. Therefore, this circumstance assumes significance, while appreciating the contentions of the plaintiffs and defence put up by

the defendants. Factually, speaking messages reproduced above do not even suggest 'that defendants had communicated plaintiffs before hand that

Rs.4,35,000/- would be adjusted against the dues.' On the contrary, messages in clear terms suggest that second consignment would be released on

receipt of Rs.4,35,000/-.

In fact, on assurance by the defendants that upon receiving Rs.4,35,000/-, consignment would be released, plaintiffs made no mistake in

believing the defendants in paying Rs.4,35,000/- on 30th May, 2020. However, defendant's intention was otherwise, as is evident from the

messages dated 1st and 3rd June, 2020, which I re-produce, again:

'[01/06/20, 2:37:57 PM] S N Nagar : Good afternoon Sir'. Hope you are getting thereafter B/L released for 3 containers of Iran'.

We had made the payment to you as

[01/06/20, 2:41:46 PM] Rajan Micro 2 : Sorry sir payment not as per our agreement you have misunderstood kindly check with bharat.

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new chtrs are stuff and reached the port for export we will release this B1 ALONG WITH MINIMUM PAYMENT OF 20 LACS. This are

my two requirements sir. I have always supported your company and trusted & respect your commitment but we are business not

exchanging services/ money on personal relationships. Hope sir you understand. You should understand despite all this we release 9cntrs

B1 just to help you out (from the beginning I was not in favour and against our business policy) request you not to take too much advantage

of relationship.!!

22. Thus, upon reading the text messages of 1st, 2nd and 3rd June together, it is to be observed that after receiving Rs.4,35,000/-, defendants made, the release of consignment, conditional and exercised a right to retain goods under Section 171 of the Indian Contract Act, 1872. However, messages of 3rd June, 2020 show that the defendants had not exercised a particular lien but a general lien. If read carefully, 3rd June message, does not suggest, goods were retained for not making payment of sea freight for second consignment. In fact, evidence and the circumstances emerging and flowing were indicative of the fact that Rs.4,35,000/- were paid towards freight charges of second consignment and not against dues, however, in breach of assurance/promise, defendants, adjusted it against dues and declined to release bills. The question nos.15 (i., (ii. and (iii. are answered accordingly, in negative.

23 Now so far as the issue, whether defendants were entitled to exercise lien under Section 171 of the Indian Contract Act, 1872 is concerned, it may be stated that defendants were not entitled to exercise general lien being not banker, factors, wharfingers, attorneys and also broker.

24 The Hon'ble Apex Court in the case of Board of Trustees of the Port of Bombay and others v. Sriyanesh Knitters (1999) 7 Supreme Court Cases

359 has observed in paragraph 17 thus:

¶17 Having come to the conclusion that the MPT Act does not oust the provisions of Section 171 of the Contract Act what we have now to

see is whether the appellants can claim any relief or benefit under the said section. Section 171 of the Indian Contract Act, 1872, reads as

follows:

171 General lien of bankers, factors, wharfingers, attorneys, and policy-brokers - Bankers, factors, wharfingers, attorneys of a High Court

and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods

bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express

contract to that effect.

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 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 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.â€

In the case in hand, pleadings of either party do not suggest that bailee was empowered to exercise the general lien envisaged under Section 171 of the

Indian Contract Act, 1872.

25. Thus, in consideration of the facts, evidence and circumstances emerging and flowed therefrom, I hold that

(1). Rs.4,35,000/- were paid by the plaintiffs on 30th May, 2020 to the defendants towards sea freight charges for second consignment;

(2). Circumstances prevailing were "indicative of the fact" that Rs.4,35,000/- were paid towards second consignment and therefore, defendants

were not justified in adjusting it against the dues;

(3). Defendants were not entitled to exercise general lien in terms of Section 171 of the Indian Contract Act, 1872.

26. Goods cargo in the second shipment is a paper, a perishable product, which may lose its utility if kept for long period. Even otherwise, plaintiffs

have paid sea freight for second consignment. Therefore, it is just and proper to direct defendants to release bills of lading immediately. In fact, it

appears, that since second consignment has not been released within reasonable time, plaintiffs vendees have cancelled the orders. Therefore, the

balance of convenience also tilts in favour of the plaintiffs.

27. For the reasons stated above, I pass the following order:

(I) Appeal is allowed.

(ii) Impugned order dated 10th August, 2020 passed by the I/c District Judge-2, Pune is quashed and set aside.

(iii) Prayer clause (b. of the Civil Application is granted and made absolute.

28 As the appeal itself is disposed of, nothing survives in the civil application therein and the same is also disposed of.