

**(1955) 08 CAL CK 0001**

**Calcutta High Court**

**Case No:** Suit No. 4474 of 1949

Hajee Sattar Hajee Peer  
Mohamed

APPELLANT

Vs

Calcutta Port Commissioners

RESPONDENT

---

**Date of Decision:** Aug. 12, 1955

**Acts Referred:**

- Calcutta Port Act, 1890 - Section 112, 112(2), 112(7), 113, 113(1)
- Contract Act, 1872 - Section 151, 152, 161
- Limitation Act, 1963 - Article 2, 23, 29(2)
- Railways Act, 1989 - Section 72

**Citation:** (1957) 2 ILR (Cal) 671

**Hon'ble Judges:** Bose, J

**Bench:** Single Bench

**Advocate:** A.K. Sen and S.C. Ghose, for the Appellant; F.S.R. Svrita and Ajit C. Ganguly, for the Respondent

**Final Decision:** Dismissed

---

**Judgement**

Bose, J.

This is a suit for "recovery of 95 drums of liquid paraffin oil which the Plaintiff imported from the United States of America and in the alternative for Rs. 21,375 being the value thereof and for certain other reliefs.

2. The case of the Plaintiff firm is that it is the owner of 190 drums of liquid paraffin bearing marks Versoil H.S.H.T. of 50/60 viscosity which arrived by the Steamer S.S. "Steel Recorder" and which were landed at the Calcutta Port on or about March 21, 1949. The Plaintiff duly applied for and obtained delivery of 95 drums on or about April 2, 1949. The Defendants have, however, wrongfully failed and neglected to deliver the remaining 95 drums in spite of demands and are wrongfully continuing in possession of the same and are converting the same to their own use and

detaining the same. The Plaintiff, therefore, claims return of the said 95 drums or the value of the said goods calculated at Rs. 225 per drum (being the market price at Calcutta) as damages for non-delivery and/or for wrongful conversion.

3. The present suit was filed on November 28, 1949.

4. The Defendants' solicitors Messrs. Sandersons and Morgans asked for certain particulars of the plaint by their letter, dated December 27, 1949. The Plaintiff's solicitors Messrs. Mukherjee and Biswas supplied some of the particulars asked for but refused to supply any particulars of "conversion" by their letter, dated February 17, 1950.

5. In the written statement filed by the Defendants on March 20, 1950, it is stated that the goods in suit were landed at the port between March 16 and 18, 1949, and the Plaintiff applied for delivery on April 1, 1949 and removed 95 drums only by April 2, 1949. The balance of the goods landed, not having been removed within three clear working days from the time of landing, the said goods remained on the Defendants' premises at the sole risk and expense of the owner of the goods. The charges of wrongful possession, conversion and detention are denied. The liability to return the 95 drums or to pay damages for non-delivery or conversion, is repudiated. It is stated further that the suit is barred by limitation under the provisions of the Calcutta Port Act (Ben. III of 1890).

6. The following issues were raised at the hearing:

1. Have the Defendants wrongfully failed or neglected to deliver the 95 drums as alleged in para. 3 of the plaint ?

2. (a) Did the Plaintiff fail to remove the goods in suit within three clear working days from the time of the landing of the goods without any default on the part of the Defendants?

(b) Did the goods remain at the risk and expense of the Plaintiff after three days from the time of the landing as alleged in para. 3 of the written statement

(c) Does Section 113 of the Calcutta Port Act apply to the facts and circumstances of this case?

3. When in fact were the goods in suit landed? How is the period of three days contemplated u/s 113 of the Act to be computed?

4. Did the Plaintiff apply for delivery of the goods in suit on March 23, 1949, as alleged in para. 2 of the plaint and in the particulars thereof as set out in the letter, dated February 17, 1950?

5. (a) Are the Defendants wrongfully continuing in possession of the goods in suit, or

(b) converting the same, or

(c) detaining the same?

6. Is the suit barred by limitation u/s 142 of the Calcutta Port Act?

7. Is the Plaintiff entitled to claim Rs. 21,375 or any other sum on account of the damages as claimed in para. 4 of the plaint?

8. To what relief, if any, is the Plaintiff entitled?

(His Lordship, then discussed the evidence and come to the following conclusion.)

7. It is thus clear from the evidence that sometime prior to June 8, 1949 or near about that date, the 88 drums out of the detained 95 drums were removed to Oudh North, which is in the enlarge of the Port Commissioners. But no materials are placed before the Court to show what happened to the goods alter they were removed, excepting that sometime after the filing of the suit, on or about December 21, 1949, a report is alleged to have been made to the port police that the 88 drums were missing, and the police Were asked to make an investigation about the loss. But no evidence has been adduced to show whether the police did make any investigation or what was the result of such investigation. Similarly with regard to the seven drums, a police report was made on June 7, 1949, but no action appears to have been taken by the police on this report either. This report is not signed by anybody. The original reports are not forthcoming from the port police. Monoranjan Chakravarty, has stated that the two police reports have been destroyed but there is no satisfactory proof of such destruction. The present suit was filed on November 28, 1949 and one of the police reports was made, if at all, on December 21, 1949. (That is after the suit.) It is curious that no steps were taken by the Defendants nor was even any request made to the port police to preserve these police reports although a suit had been filed with regard to the goods.

8. It is not proved or established by the Defendants that at any point of time the balance of 95 drums were delivered to the Plaintiff or its representatives. So it is clear that these 95 drums were lost, if at all, (but in my view the fact of loss has not been proved), when the goods were in the custody of the Defendants and the Defendants being the bailees of the goods, such loss would be prima facie evidence of their negligence, (see Pollock and Mulla, Contract Act, Notes to Sections 151 and 152) and they would ordinarily be liable to compensate the Plaintiff for the loss of 95 drums for non-delivery. It is to be noted however that the evidence of Paramananda Roy, makes it clear that the Port Commissioners take all possible precautions and care with regard to the goods and there is nothing to show that such care was not taken in this case.

9. Now the question is whether Section 113 of the Calcutta Port Act exonerates the Defendants from such liability. The learned Counsel for the Defendants strongly relies on this Section 113 and he has contended that by reason of the section, the Defendant became absolved from all liability in respect of the goods in suit, after the

expiration of three clear working days from the time of the landing of the goods. But in order that the Defendants can take shelter under this section, it has to be shown that there has been no default on the part of the Port Commissioners within the material period of the three clear working days which in any way prevented the owner from removing the goods within the three clear working days.

10. Now an issue has been raised as to how the period of three clear working days is to be computed. But this question does not present any difficulty. The section is quite clear. If all the goods were landed by March 18, 1949, which, I think, was the fact, then the three clear working days would expire On March 21, 1949, provided there was no intervening holiday, in which case, such holiday would be excluded in computing the period. If the date of landing is to be taken as March 21, 1949, which was the common landing date, then the three days would expire on March 24, 1949. Consequently for the goods which remained at the Port Commissioners premises after March 24, 1949 (though I am inclined to take the view that the period of three days is to be computed from March 18, 1949), the liability of the Port Commissioners which was that of a bailee, u/s 112 of the Calcutta Port Act, read with Sections 151, 152 and 161 of the Indian Contract Act, ceased, and the goods thenceforward remained at the risk and expense of the Plaintiff.

11. Now the Jetty Sarkar, Mr. Kadre has stated that the ship "Steel Recorder" arrived at the Calcutta Port on March 15, 1949 (Q. 139), but he did not file the Bill of Entry and the other shipping documents which the Customs Department till March 21, 1949 (Q. 157). The reason for his filing the Bill of Entry after six days of the arrival of the ship Was that he did not get the original shipping and other documents from the Bank to whom the documents had been sent (Q. 158). It is also admitted by this witness that as his master made delay in making the payment to the Bank, the documents could not be obtained earlier from the Bank. But he cannot explain why was there this delay in making payment to the Bank. (Q. 159, 165.) It is thus clear that it was owing to the delay or laches on the part of the Plaintiff that the documents could not be obtained from the Bank earlier and the Bill of Entry Could not be filed with the Customs before March 21, 1949. If the Bill of Entry and other documents had been presented before the Customs on March 15 or 16, 1949, the goods might have been released by the Customs before March 24, and the Plaintiff would have removed the goods by March 24,. It is in evidence that the Customs takes about five to seven days to complete the formalities and to release the goods. So it cannot be said that it was owing to any default of the Defendants that the Plaintiff was not able to remove the goods.

12. Moreover, the default of the Port Commissioners as contemplated in Section 113 of the Act means, some act or conduct for which the blame is attributable to the Port Commissioners themselves. In other words the act or omission must be one for which the Defendants can be made solely responsible. The act of default must be the creation of the Defendants, alone. But when the Port Commissioners are unable

to allow the goods to be taken because the Customs authorities have not released the goods, such a default is not the default of the Port Commissioners as contemplated by Section 113 of the Calcutta Port Act.

13. Mr. A.K. Sen has submitted that u/s 112(7) of Act, the responsibility of the Port Commissioners for loss, destruction or deterioration of the goods whether landed for import or received for export, is that of a bailee during such time as the same remain in the possession or under the control of the Commissioners and it is this liability which ceases u/s 113(2) of the Act, if the goods are not removed within three clear working days, but the liability to return or deliver, to the true owner, the goods which remain on the premises of the Defendants in their custody and which are not lost or destroyed, does not cease by virtue of Section 113(2) of the Act.

14. It appears however from the case of Puma Chandra Kundoo v. Port Commissioners of Calcutta ILR (1918) Cal. 56, 59, that Greaves, J. in construing Section 113(2) made the following observations:

I think the words "sole risk" mean what they say, and that after the expiration of three days, unless there has been any default on the part, of the Commissioners, they are free from liability in respect of the goods whatever may have happened to them.

15. This observation, read with the words "all liability which the "Commissioners may have hitherto incurred in respect of such "goods has ceased" in Section 114 of the Calcutta Port Act, suggests that whatever liability was there is wiped out. But this was a case where the goods were lost and the observations, therefore, must be limited to the facts of that case But Sarkar, J. in the case of Prabhudas Mulji Doshi v. Governor-General of India in Council ILR (1951) Cal. 443, 461 462, has observed as follows:

The only liability that the Port Commissioners have in respect of the goods under their statute is to take reasonable care of the goods (Section 112(1)). The effect of Section 113 (2) is to absolve them of this liability after the prescribed period of three days has expired, so that they have thereafter no statutory liability for the goods and to get this release from liability all that they have to prove is that three days have expired and that there has been no default on their part preventing the removal of the goods. It is true that in spite of Section 113(2) they would be liable for any tortious or wrongful act done by them in respect of the goods but different considerations arise in respect of such liability. The argument of the Plaintiff mixes up the two kinds of liabilities of the Port Commissioners, viz., the statutory liability u/s 112(7) of the Port Act and the liability in conversion purely as a tort independent of the statute. It is only in respect of the first kind of liability that Section 113(2) provides the Port Commissioners with a defence....

16. In the case of Commissioners for the Port of Calcutta v. Ghasiram Lachminarayan and Co. (1955) 59 C.W.N. 921, 926 Das Gupta, J. and Debabrata

Mookerjee, J. after quoting Section 112 of the Calcutta Port Act made the following observations:

The second Sub-section of Section 113 limits the liability in effect to three days from the time of landing....etc....

This was also a case where the goods could not be traced.

17. It is thus clear that if the goods are not lost or destroyed but they are in existence and are in the possession of the Port Commissioners, the latter cannot avoid their liability to return the goods on demand by the true owner, and Section 113(2) affords no defence in such a case.

18. Mr. Sen drew my attention to Section 72 of the Railway Act and to the cases of East India Railway Company v. Jogpat Singh ILR (1924) Cal. 615 and Haji Tilloi Mahammad Umer Buksh v. Bengal Nagpur Railway Co. Ltd. ILR (1929) Cal. 73, to show that the liability or responsibility of the Port Commissioners dealt with in Section 112(2) and 113(2) of the Port Act has reference to, or in other words, should be limited to, liability for loss, destruction and deterioration of goods only and it has no reference to any other liability. But it is not necessary to deal with these cases in any detail.

19. It is also contended by the learned Counsel on behalf of the Defendants that the suit is barred by reason of the provisions of Section 142 of the Calcutta Port Act.

20. Section 142 is as follows:

No suit shall be brought against any person for anything done or purporting or professing to be done in pursuance of this Act, after the expiration of three months from the day on which the cause of action in such suit shall have arisen.

21. It is pointed out by Mr. Surita that the cause of action pleaded being detention or conversion, and the alleged demand and refusal as appearing from the evidence being on July 11, or July 16, 1949, the suit was barred after the expiration of three months from either of the said dates; but the suit was not instituted till November 28, 1949.

22. Mr. A.K. Sen, the learned Counsel for the Plaintiff, has on the other hand submitted that wrongful detention or conversion is a continuing wrong and it furnishes a recurring cause of action which arises de die in diem so long as the detention continues. There is a Madras case, Yamuna Bai Rani Sahiba v. Soloyya Kavundan ILR (1901) Mad. 339, 341, and there are two [Jhabbu and Another Vs. Musammat Batul and Others](#), and [Manga Vs. Changa Mal](#), which lend some support to this contention, but the weight of authority is against such contention. In the case of D. Hughes v. Chairman of Municipal Commissioners of Howrah (1873) 19 Sutherland's W.R. 339, 341, a Division Bench of this Court presided over by Sir Richard Couch, C.J. and Glover, J. made the following observation:

In this case, if the Plaintiff had any cause of action, it accrued upon the seizure of the omnibus, and he was bound to bring this suit within three months from the time of the seizure. He could not, under the circumstances, treat the continued detention of the omnibus as fresh causes of action from day to day; and that is not the view taken by the Small Cause Court Judge.

23. This Calcutta case has been approved of and followed by the Madras High Court in the case of Pannaji Devicjiand v. Senaji Kapwchand ILR (1930) Mad. 621, 628-629.

24. The case of Yamunabai ILR (1901) Mad. 339, 341 has been distinguished in Pamu Sanyasi v. Zemindar of Jayapur ILR (1901) Mad. 540, 542, and this latter case has been approved of in V.N. Venkataramier v. Vythilinga Thambiran ILR (1913) Mad. 655. The case of Salem Municipality v. and S.G. Bhakthavatsalu Naidu ILR (1937) Mad. 491, also holds, that detention is not a continuing wrong and the same view is shared by the Full Bench of the Rangoon High Court (see Eng Gim Moh v. Chinese Merited Banking Company Limited AIR (1940) Rang. 276, 277. F.B.).

25. The English Courts have also taken the same view in r numerous cases and it is sufficient to refer to the case of Clayton v. Le Roy (1911) 2 K.B. 1031. Fletcher Moulton, L.J., thus observed at page 1048: "In an action of detinue, as in other actions of "tort, the Statute of limitations runs from when the cause of "action arose... If there is a demand by the owner from "the person in possession of the chattel and a refusal on the part "of the latter to give it up, then in sis years the remedy of the "owner is barred". (See also Wilkinson v. Verity (1871) L.R. 6 C.P. 206, at 210 per Willes, J., and Beaman v. A.R.T.S. Ltd. (1948) 2 All. E.R. 89, at 92 per Denning, J.).

26. Moreover, it is to be noted that Section 142 of the Calcutta Port Act being a special law, the applicability of Section 23 of the Indian Limitation Act, which deals with continuous breaches of contract and continuing wrongs is excluded by virtue of the provisions of Section 29(2), Sub-clauses (a) and (b) of the Limitation Act.

27. This contention of Mr. Sen, therefore, fails.

28. It is next contended by Mr. A.K. Sen that though the goods had been landed and taken charge of by the Port Commissioners purporting to act in pursuance of the statutory duty, the detention or non-delivery of the goods after July 8, 1949, when the Customs had released the goods, and after the wharfage rent and other dues had been paid off by the Plaintiff cannot be said to be anything done in pursuance of this Act. Therefore Section 142 does not apply.

29. Sarkar, J. has, however, held in the case already referred to in an earlier part of this judgment (Prabhudas Mulji Doshi v. Governor-General of India in Council (Supra)) that Section 142 is designed to protect the Port Commissioners in respect of wrongful acts done by them. The learned Judge has further held that an act of refusal to deliver the goods or the non-delivery of the goods is a thing done or

omitted to be done in the Port Commissioners" statutory capacity and so the suit before him was barred under the provisions of Section 142 of the Port Act.

30. Mr. A.K. Sen has submitted that it is not every act or omission which is protected u/s 142. The act or omission must be one which was in discharge of statutory duty or in purported or professed discharge of statutory duty and it must not be one which was in contravention of the provisions of the statute. Further the act or omission must be bona fide. Mr. Sen relies on the wordings of Article 2 of the Limitation Act and on a Full Bench decision of the Lahore High Court, Mahomad Saadat Ali Khan v. Administrator, Corporation of City of Lahore ILR (1945) Lah. 523, especially on the judgments of Abdur Rahman, J. and Mahajan, J. But Abdur Rahman, J. has pointed out that Article 2 of the Limitation Act is substantially different from Section 142 of the Port Act (p. 329, 1st column, of AIR (1945) Lah.). Mahajan, J. has also pointed out that Article 2 of the Limitation Act has limited scope and application, while the language of the English Public Authorities Protection Act, 1893, is much wider and is more comprehensive in its scope. (p. 331 of AIR (1945) Lah., 1st column. Mr. Sen also placed reliance on Ranchordas Morarji v. Municipal Commissioner for the City of Bombay ILR (1901) Bom. 387, 389, and Punjab Cotton Press Company Limited v. Secretary of State for India in Council (1927) 31 C.W.N. 835, both referred to in the Lahore case I.L.R.(1945) Lah. 523).

31. It is to be remembered that the wordings of Section 142 of the Port Act are "for anything done or purporting or professing to be done in pursuance of this Act." These words of Section 142 have been construed by the Judicial Committee in the case of Calcutta Port Commissioners v. Corporation of Calcutta ILR (1938) Cal. 440 : 64 L.R. IndAp 363, as affording protection against claim based on a breach of statutory duty as also claim based on omission to perform a statutory duty. The Court of Appeal in Calcutta had held that the Port Commissioners were not protected by Section 142 as the acts of their officer, Mr. Chatterjee, in making and leaving the holes open could not be said to have been done in pursuance of the Port Act. The Privy Council disagreed with this view and observed: at page 447 of ILR (1938) Cal.

In what Chatterjee did or omitted to do, he was solely concerned with his employers" business. The Respondents" argument was that the Appellants failed to repair a part of their railway line which was situated on their own land. In these circumstances, it is vain, in their lordships opinion to suggest, as the Respondents did, that the Appellants were acting in a private capacity or indeed in any other than their statutory capacity.

32. Then further down the following observation occurs:

Their Lordships are clearly of opinion that the Appellants did not divest themselves of their capacity as a Port Authority and did not assume some other capacity, in having the work done.

33. Then again at p. 448, the Privy Council further observed:

In particular the English Act does not contain the words "purporting or professing to act in pursuance of the statute". Their Lordships regard these words as of pivotal importance. Their presence in the statute appears to postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute.

34. Then the concluding paragraph at p. 449 are as follows:

The Respondents argued that the Indian statute fell to be strictly construed, and that while it protects against a claim based on breach of statutory duty it does not protect against an omission to perform a statutory duty. Their Lordships are unable to accept either argument. The argument is unsupported by authority, or from any other source.

The Court of appeal in their judgment would appear, their Lordships think, to have forgotten (1) that the Appellants were engaged in work designed for the protection of their railway and (2) that the neglect complained of was leaving unrepaired a portion of that railway. These circumstances, in their Lordships' view render it impossible to divorce the work which was being done from the statutory capacity in which the Appellants were doing it.

35. Bearing these observations in mind, the nature of the duties and responsibilities of the Port Commissioners with regard to imported goods may now be briefly considered. The Port Commissioners, when they land goods and take charge of them, do so, in the discharge of their statutory duty or obligation, as imposed by Section 113(1) of the Port Act, and for three days after the date of landing, the liability of the Port Commissioners, in respect of such goods, is that of a bailee u/s 112(2) of the Act, and if, during this period, for default of the Port Commissioners, the goods are not returned or delivered to the owner of the goods, the Port Commissioners become responsible for the loss, destruction or deterioration of the goods as provided in Section 161 of the Indian Contract Act. But after the expiry of the three working days, if the owner fails to remove the goods, the liability of the Port Commissioners as bailee comes to an end, but the goods continue to remain in their custody or possession in their official or statutory capacity. The Port Commissioners do not continue to hold the goods after three days as private persons or as a private body but in their official character and if goods are demanded from them, the demand is made to them in their statutory capacity and the omission to give delivery (if they do not deliver) is an act or omission of a nature which cannot be dissociated from their official capacity. In other words, the possession of the goods by the Port Commissioners, originated in course of performance or discharge of their statutory duty in pursuance of the Port Act and the failure to give up possession of the goods was an omission to perform an implied statutory or official duty (see as to implied obligations, Maxwell, Statutes,

10th ed., pp. 367-368). It may be that this act of withholding delivery was an. illegal or tortious act but it is clear from decided cases (see Secretary of State for India in Council v. Lodna Colliery Company Limited ILR (1935) Pat. 510, Selmes v. Judge (1871) L.R. 6 Q.B. 724, 727 and other cases), that it is to give protection to public officers or public bodies, against such illegal or tortious acts that sections like Section 142 are enacted. In the Privy Council case, the act of leaving the holes open and unrepaired, was an act of negligence, or in other words, a tortious act, but the Privy Council held that such an act was protected by the section.

36. In the case of [Basanta Lal Vs. Comrs. for the Port of Calcutta and Others](#) , R.P. Mookerjee, J. has held that even when the Port Commissioners are guilty of improper acts which amount to misconduct, or are guilty of acts which are mala fide, such acts are protected by Section 142 of the Calcutta Port Act. I am, however, unable to agree with the proposition that even mala fide acts are protected. No case of mala fide has, however, been established against the Defendants in this case.

37. I hold that the Plaintiff's suit is barred by the provisions of Section 142 of the Port Act.

38. I may, however, point out that if the Privy Council had not made the observations which it made in Calcutta Port Commissioners v. Corporation, of Calcutta (Supra), I would be inclined to hold, if it had been proved that the Defendants had been guilty of conversion or detention as alleged in the plaint, that Section 142 had no application to the facts and circumstances of this case.

39. The next question is whether the Defendants can be said to have been guilty of any act of conversion or detention. Now in order to found a cause of action for detention the Plaintiff has to establish a case of demand for return or delivery of the goods and refusal on the part of the Defendants to return or give delivery of the goods. (See Clayton v. Le Roy (Supra).) Mr. A.K. Sen has drawn the attention of the Court to the case of Beaman v. A.R.T.S. Ltd. (Supra), to show that no express refusal is necessary to found a case of detention. If there is withholding of delivery of the chattel for a reasonable time after demand is made for its return, that is sufficient to constitute detention. Now the evidence given on behalf of the Plaintiff, by Mr. Kadre, is, as I have pointed out already, that on July 11, 1949, he went and demanded delivery of the goods from the shed clerk. It appears, however, from the Wharf Rent Bill, dated June 8, 1949, which was paid off by the Plaintiff on June 14, 1949, that the Plaintiff had been charged Rs. 25-8 for removal of the 88 drums to the Import Warehouse in that bill. So it is clear that the goods had been removed to the Import Warehouse before that date or on that date or very shortly thereafter. But still no attempt was made to obtain delivery from the Import Warehouse but delivery was asked from the shed clerk at the shed. Kadre has of course stated that he did not know that the goods had been removed to the Import Warehouse as he did not see the bill (ex. 1) carefully. It is possible that at the time, he paid the bill on June 14, 1949, he did not scrutinise all the items of the bill; but I find it difficult to believe that

neither Kadre nor anybody else of the Plaintiff firm nor anybody of the firm of clearing agents looked into the bill at any point of time between June 14, 1949 and July 11, 1949, although the bill was lying with the Plaintiff since June 14, 1949. However the reply of the shed clerk, when he was asked to give delivery was that he could not identify the goods and so he asked the Plaintiff's representative to come three or four days thereafter. Kadre's evidence further is that thereupon he himself entered the remarks "NOT FOUND" in the Shed Delivery Register on July 11, 1949. (Kadre Q. 97. 254-255, 286, 293-298 and 302). But after that, when he went again the goods were not delivered. It is however not quite clear from the evidence why the goods were not delivered, but it appears to me that the goods could not be identified and that is why delivery was not given. Kadre has not been frank enough to admit it. There is nothing to show that the officers of the Defendant at any point of time positively refused to give delivery. It is true that by the letter of the Plaintiff's solicitor, dated July 16, 1949, delivery was asked for, but there is no suggestion in this letter, that the Defendants had refused to give delivery of the goods at any point of time. Mr. Sen has argued that the very fact that the Defendants did not reply to this letter nor give delivery within a reasonable time, is evidence of refusal and of detention. It has, however, been held that mere silence and not replying to a letter, does not amount to refusal. (*Gopalsami Ayyar v. Subramania Sastri* ILR (1911) Mad. 636, 638-639; see also *Gopal Chandra Hose v. Surendra Nath Dutt* (1908) 12 C.W.N. 1010, 1013 1014.) It is significant that there is no pleading in the plaint of any positive refusal to return or deliver the goods on the part of the Defendants. The only allegation is that the Defendants have failed and neglected to deliver the goods on demand. The word "detained" has of course been pleaded and this saves the plaint from being thrown out as not disclosing any cause of action for detinue or detention, but the evidence to my mind falls short of establishing a clear case of refusal on the part of the Defendants to give delivery of or to return the goods. In the circumstances, I am constrained to hold that the Plaintiff has failed to prove to the satisfaction of the Court, the case of detention or conversion as alleged in the plaint.

40. The only other point which remains for consideration is whether the Defendants can seek the protection u/s 113(2) of the Port Act without complying with the requirements of Section 114 of the Act. This question has been answered in the affirmative by this Court in *Puma Chandra Kundoo v. Port Commissioners of Calcutta* (Supra), *Prabhuji Mulji Doshi v. Governor-General of India in Council* (Supra), and *Commissioners for the Port of Calcutta v. Ghasiram Lachminarayan and Co.* (Supra) and I respectfully agree with those decisions.

41. It may be noted that if the Plaintiff had succeeded in this suit, I would have granted the Plaintiff a decree for the value of the 95 drums at Rs. 4-6 per imperial gallon and on the basis that each drum contained 45 gallons.

42. In my view, this suit must fail and it is accordingly dismissed with costs. Certified for two counsel.