

(2007) 09 CAL CK 0010

Calcutta High Court

Case No: M.A.T. No. 1797 of 2004

Board of Trustees for the Port of
Calcutta and Others

APPELLANT

Vs

Poddar Industrial Corporation
and Others

RESPONDENT

Date of Decision: Sept. 7, 2007

Citation: (2008) 1 CHN 1084

Hon'ble Judges: Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: S.K. Roy Chowdhury and Dipak Ranjan Mukherjee, for the Appellant; Anil Kumar Gupta and Smita Khaitan, for the Respondent

Final Decision: Allowed

Judgement

Bhaskar Bhattacharya, J.

This mandamus appeal is at the instance of the Calcutta Port Trust and is directed against the order dated 27th April, 2004 passed by a learned Single Judge of this Court by which His Lordship disposed of a writ application filed by the respondent before us by holding that the writ petitioners were liable to pay demurrage at the applicable rate for the period between 6th August, 1990 and 14th August, 1990 and also for the period between 18th September, 1990 and 22nd September, 1990 in respect of the goods in question.

2. Being dissatisfied, the Port Trust Authority has come up with the present mandamus appeal.

3. The following facts are not in dispute:

The goods in question were landed at the Calcutta Port on 22nd July, 1990. At that point of time, a strike was going on at the instance of the private employees of the clearing agents, and those employees of the clearing agents were not clearing the goods from the port-area. The strike continued up to 5th August, 1990. In this case,

the writ petitioner approached this Court on 14th August, 1990 alleging illegal imposition of demurrage-charge for non-removal of the goods on the ground that in view of the strike of the employees of the clearing-agents, they were not in a position to remove the goods and as such, they should not be liable to pay demurrage. By an order dated 14th August, 1990, a learned Single Judge of this Court permitted the writ petitioners to remove the goods without payment of demurrage on their undertaking before His Lordship that in the event the writ petition failed in the long run, they would pay the demurrage-charge. The said order dated 14th August, 1990 was communicated to the Port Trust Authority on 22nd August, 1990 and the writ petitioners demanded clearance certificate for removal on the basis of the order of the learned Single Judge. The Port Trust Authority, however, did not permit the writ petitioners to remove the goods unless actual order of this Court was placed before it. Ultimately, the Port Trust Authority preferred an appeal against order dated 14th August, 1990 and on 17th September, 1990, a Division Bench of this Court modified the order passed by the learned Single Judge by directing the writ petitioners to give bank guarantee as condition precedent for removal of the goods without payment of demurrage charge levied by the Port Trust Authority subject to the final decision in the pending writ application. On September 22, 1990, the writ petitioners actually removed the goods after giving bank guarantee pursuant to the order passed by the Appellate Court.

4. When the writ application came up for final hearing, the learned Single Judge of this Court held that due to the strike of the employees of the clearing agents the writ petitioners could not be blamed and as such, upto 5th August, 1990, the writ petitioners had no liability to pay demurrage. His Lordship further held that from 6th August, 1990 until 14th August, 1990, there was no just ground for not removing the goods and therefore, for that period, the writ petitioners were liable to pay demurrage. Similarly, from August 14, 1990 till September 18, 1990 the writ petitioners had no liability to pay the demurrage as the Port Trust Authority did not permit release of the goods during that period. His Lordship further held that from 18th September, 1990, the date on which the Division Bench set aside the order of the learned Single Judge until 22nd September, 1990, the date of actual removal of the goods, the writ petitioners were liable to pay demurrage.

5. Being dissatisfied, the Port Trust Authority has come up with the present mandamus appeal.

6. Mr. Roychowdhury, the learned Senior Advocate appearing on behalf of the appellant, has vehemently attacked the order passed by the learned Single Judge on the ground that for the strike of the employees of the clearing agents, his client cannot be blamed. Mr. Roy Chowdhury points out that law imposes a duty upon the importer of the goods to remove the same from the port area within the specified time and in the matter of removal of goods, the port authority " in this case has not created any impediment. According to Mr. Roy Chowdhury, the writ petitioners

could remove their goods even without taking the assistance of the clearing agents and therefore, for the strike of the employees of the clearing " agents with whom the Port Trust Authority has no connection, the right to realise demurrage, a statutory right in favour of his client, cannot be suspended.

7. Similarly, according to Mr. Roy Chowdhury, there was no valid reason for depriving the Port Trust Authority of their right to realise demurrage from 14th August, 1990 till the actual date of removal as in his client was successful in the appeal preferred against the order of the learned Single Judge dated 14 August, 1990. In other words, Mr. Roy Chowdhury contends that his client was quite justified in refusing delivery of the goods on undertaking given by the writ petitioners before the learned Single Judge as the said order was ultimately set aside by the Division Bench in an appeal preferred by his client. Mr. Roy Chowdhury, therefore, prays for setting aside the order passed by the learned Single Judge and for passing direction upon the writ petitioners to pay the demurrage in accordance with the demand of his client.

8. Mr. Gupta, the learned Counsel appearing on behalf of the writ petitioners, on the other hand, has opposed the previously mentioned submissions of Mr. Roy Chowdhury and has supported the order passed by the learned Single Judge. According to Mr. Gupta, in the absence of any help from the clearing agents and on the contrary, on their resistance, his clients could not remove the goods till August 5, 1990 and therefore, his clients cannot be forced to pay the demurrage upto August 5, 1990. Mr. Gupta contends that the moment the order dated August 14, 1990 was brought to the notice of the Port Trust Authority, it was their duty to permit his clients to remove the goods in accordance with the direction given by the learned Single Judge and the Port Trust Authority even could not get any order of stay during the pendency of the appeal preferred by them. In such circumstances, according to Mr. Gupta, his clients had no obligation to pay the demurrage charge in spite of the fact that they were willing to remove the goods and it was the Port Trust Authority, which prevented his clients from removing the goods by not issuing the clearance without any just reason. Mr. Gupta, therefore, prays for dismissal of the present appeal after affirming the order passed by the learned Single Judge.

9. Therefore, the question that falls for determination in this mandamus appeal is whether the Port Trust Authority was justified in imposing demurrage, which is the subject-matter of this proceeding.

10. After hearing the learned Counsel for the parties and after going through the materials on record, we find substance in the contention of Mr. Roy Chowdhury that the employees of the clearing agents are not under the control or the supervision of the Port Trust Authority and, therefore, for their inaction or even the resistance, if any, the Port Trust Authority has no responsibility. It is equally clear that the writ petitioners could remove the goods even without the assistance of the clearing agents and, therefore, there was no just cause for depriving the Port Trust Authority

of their legal right to realize demurrage for belated removal of the goods. In this connection, it will not be out of place to refer to the decision of the Supreme Court in the case of the Trustees to the Port Trust, Bombay v. Indian Goods Supplying Co. reported in AIR 1977 SC 1644, where the question was whether an importer was liable to pay demurrage charge for the illegal detention of the goods by the Customs Authority; in that context, the Apex Court made the following observations:

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

11. Therefore, the writ petitioners were liable to pay demurrage from the date of arrival of goods until August 14, 1990, the date the learned Single Judge passed interim order in their favour authorising them to remove the goods on the basis of undertaking given before His Lordship.

12. The next question is whether the writ petitioners were liable to pay demurrage from August 14, 1990 until August 22, 1990, when the order of the learned Single Judge was communicated to the Port Trust Authority for the first time.

13. In this connection, we find substance in the contention of Mr. Roy Chowdhury that the order dated August 14, 1990 being an ex parte order, so long the said order was not communicated to his client, they had no obligation to permit removal of the goods without the full charge of demurrage payable in accordance with law. We, therefore, hold that the writ petitioners were bound to pay the charge of demurrage till August 22, 1990, the date of communication of the order passed by the learned Single Judge.

14. The next question is whether the Port Trust Authority was justified in refusing to give clearance certificate in spite of undertaking given by the writ petitioners according to the order passed by the learned Single Judge particularly when the Port Trust Authority, in spite of preferring appeal against such order, did not get any order of stay from the Appellate Court.

15. After hearing the learned Counsel for the parties, we are of the firm opinion that the moment the order of the learned Single Judge was brought to the notice of the Port Trust Authority, it was their duty to honour the same so long the said order was not stayed or set aside by the competent Court. We have already pointed out that the order of the learned Single Judge dated August 14, 1990 was set aside by the Appellate Court on September 18, 1990 by modifying the same with the direction to give bank-guarantee instead of undertaking. Therefore, the Port Trust Authority had no just reason of not issuing the clearance order from August 22, 1990 until September 18, 1990 when the writ petitioners were ready to remove the goods in

accordance with the order passed by the learned Single Judge.

16. We, therefore, find that in the case before us, the writ petitioners were bound to pay demurrage at the applicable rates from the date of arrival of the goods until August 21, 1990 and again from September 18, 1990 to September 22, 1990, the date of actual removal.

17. We, accordingly, set aside the order passed by the learned Single Judge and direct the appellant to realise demurrage at the applicable rates for the periods mentioned above.

18. It appears from records that although the writ petitioners removed the goods by giving bank guarantee on September 22, 1990, the writ application was once dismissed for default and taking advantage of want of any interim order, the Port Trust Authority invoked the bank guarantee. After the restoration of the writ application, when the same was finally disposed of by the learned Single Judge by the order impugned, His Lordship directed the Port Trust Authority to calculate its dues in accordance with the order impugned before us within one month from the date of service of copy of the order and to refund the excess of the invoked amount than the actual due with further liberty to demand any amount which was still payable to the Port Trust Authority. It further appears that a Division Bench of this Court while granting stay of operation of such order directed the Port Trust Authority to deposit a sum of Rs. 1 lakh with the learned Registrar General of this Court as condition of stay subject to the final decision of this appeal. Now that the appeal has been allowed in part, we direct the appellant to recalculate the dues in accordance with this order and to refund or demand the excess amount over the amount already realised by invoking the bank guarantee, as the case may be. While calculating the dues, interest at the rate of 10% per annum will be payable from the date of accrual of dues upto December 31, 1999 and at the rate of 8% per annum from January 1, 2000 until today and at the rate of 12% per annum from today till actual payment. The parties are directed to file the calculation of the dues payable in accordance with this order before this Court within fortnight from today. The learned Registrar General is directed to convey to this Court the total amount including the accrued amount of interest at present lying in the account in which the money was deposited.

Rudrendra Nath Banerjee, J.

19. I agree.