

(2007) 09 CAL CK 0059

Calcutta High Court

Case No: MAT No. 102 of 2007, CAN No. 209 of 2007 and W.P. No. 3497 (W) of 2006

Chairman, Board of
Trustees for the Port of
Kolkata and Another

APPELLANT

Vs

Iftikher Khan and
Others

RESPONDENT

Date of Decision: Sept. 21, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11
- Contract Act, 1872 - Section 171
- Major Port Trusts Act, 1963 - Section 59, 61, 62

Citation: (2008) 1 CHN 516 : 112 CWN 1004

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Arun Kumar Bhattacharya, J

Bench: Division Bench

Judgement

1. This application has arisen in connection with an appeal preferred by the petitioner/appellant from an order dated 11th September, 2006 passed by a learned Single Judge of this Court in CAN No. 6823 of 2006 arising out of W.P. No. 3497(W) of 2006 for stay of operation of the impugned order. The order impugned was passed on the application filed by the appellant for modification of an earlier order dated 20th February, 2006 passed by the same learned Single Judge. By the order impugned the learned Single Judge has passed order slightly modifying earlier order to the extent to direct the respondent No. 8 to furnish an unconditional bank guarantee for a sum of Rs. 30,50,000/- within a period of fortnight from the date of passing of the order. Upon deposit of the said bank guarantee the applicant Board shall allow the petitioner to remove the logs. For the said purpose the Board shall take all steps including demolition of the brick wall, if any, which is standing in the way of removing the logs.

2. In the application for modification the appellant before us asked for an order that the logs in question lying in the plots of land of Kolkata Port Trust shall not be allowed to remove without securing the total dues of the rent/damages in terms of the order dated February 20, 2006 of this Hon"ble Court. Actually, it appears that the calculation arrived at by the learned Trial Judge initially for payment of occupation charges was not accepted and the claim of the appellant was much more. The Chairman, Board of Trustees was not satisfied with the aforesaid order and hence appeal was preferred. The following facts emerge before us have been narrated hereunder:

In or about January, 2006 first respondent, the writ petitioner stored imported consignment of logs at the storage place which is under physical custody of the respondent No. 8 after clearance from the customs authorities. However, they could not remove the goods as the Port authorities dug trenches and put up wall to prevent removal of the goods from the storage place and this had happened on or about 21st January, 2006. On or about 20th February, 2006 the first respondent, the writ petitioner, being aggrieved by detention of the goods by the appellant herein, filed a writ petition. On that date an order was passed allowing removal of the logs on condition that 25% of the total amount of rent of Rs. 31,45,000/- calculated at the rate of 85,000/- per month for the period of January, 2003 to January, 2006 i.e. Rs. 7,86,250/- was to be paid. The balance was directed to be paid in equal instalments in the subsequent months. The writ petitioner, in or about April, 2006 without carrying out the said direction preferred an appeal against the said order dated 20th February, 2006 and the appellant herein also filed the cross-objection against the said order. On 27th June, 2006 both the appeal and the cross-objection were dismissed as not being pressed. Hence, in terms of the earlier order dated 20th February, 2006 the first instalment of Rs. 7,86,250/- was tendered for payment and demanded release of the goods. Thereafter the aforesaid application was made by the appellant before us. It appears further from the records that on or about 28th October, 2005 the respondent No. 7, one M/s. Shaw Enterprises, the sole proprietor of which is Shri Rajeswar Shaw, filed a writ petition in this Court on or about 28th October, 2005 against the Port authorities, inter alia, praying for a writ of mandamus commanding the respondents particularly Port authorities not to interfere with the peaceful possession for enjoyment of the suit premises by the petitioner and other consequential reliefs. The basis of making the aforesaid writ petition was that the respondent No. 7 herein has been in possession of a plot of land in question since 2003 and as such carrying on business on the said plot of land by storing of goods and materials and also logs imported from different countries which is also known as warehouse business. On 20th October, 2005 the said respondent (the writ petitioner herein) obtained interim order as prayed for, for limited period and thereafter the said interim order stood automatically vacated due to efflux of time. The said writ petition has not been heard out as yet though all affidavits have been completed. As such whether the possession and occupation of the respondent No. 7 is unauthorised or not or as such it can get relief therein, cannot be observed nor decided by this Court in any manner whatsoever. In this case, according to us, of course prima facie the dispute is whether the appellant herein is entitled to the damage for

storing and keeping the imported logs at the premises owned by the Port authorities or not. In this case no decision can be rendered fixing the liability against the respondent No. 7. On the aforesaid factual aspect of the matter the application was heard after completion of filing of the affidavit.

3. Mr. Kapoor, appearing for the respondent, contends in substance that it is an admitted fact that the vacant and open land admeasuring 13,466.22 square meter belongs to the Port authorities. This plot of land was leased out and/or let or licensed out by the Port authorities to the Tata International Limited. In or about June, 2002 the plot was duly surrendered and vacated by the said Tata licensee. From the beginning of 2003 the respondent No. 8 illegally trespassed and encroached upon the said plot and unauthorisedly started occupying and possessing the same for commercial purpose. In course of this illegal business respondent No. 7 let out it to the third parties for valuable consideration without any authorities, consent or permission from the Port authorities.

4. After the interim order passed in the application filed by Shaw Enterprises stood vacated upon efflux of time the Port authorities in or about January, 2006 took possession of their property and dug a trench to prevent entry of the outsiders. It is contended that admittedly the resumption of possession of the Port authorities continued to the exclusion of others. At the time of taking possession there was a substantial quantity of logs and a crane line on the said plot.

5. Mr. Kapoor submits further that it is admitted position further that neither the writ petitioner nor Shaw Enterprises had any kind of contract with the Port authorities. It is also admitted that the writ petitioner was in possession of the entire godown measuring at 13,466.22 square meters. Shaw Enterprises undisputably encroached the said plot of land in the year, 2003 and has been in encroachment till today.

6. On the aforesaid background of the fact it is urged that the question of quantifying compensation/demurrage/damage payable to the Port authorities by the trespasser could not be done on the basis of the rent which includes periodical payment due by tenant for the land let to him under a contract. In other words, trespasser cannot be equated with the licensee and/or tenant as payment of compensation has given rise for damages done by their wrongful use of occupation. Therefore, the learned Trial Judge has approached in a wrong way while calculating the amount for payment and taken the rate of monthly rent as the unit and/or basis. The statutory schedule of rates has been fixed by the tariff authorities for realisation or calculation of the rent and also for payment/recovery of the compensation for damages done by the encroachers. Therefore, in the schedule of rate two distinctions between the rent and the damages for encroachment have been curved out. This schedule of rate is not under challenge. His further contention is that unlike rates and/or rent the damages cannot be waived nor be reduced. He submits that Port authorities has got hen u/s 59 of the Major Port Trusts Act for realisation amongst others of any charges leviable under the Act. Under these circumstances, he urges that without securing the claim of Port authorities on account of damages the logs cannot be allowed

to be removed and in that case the lien over the aforesaid logs will be lost by the order impugned herein unless claim is secured. If for any reason it is found that Port authorities has no lien u/s 59 of the Major Port Trusts Act then the Port authorities have got general right of lien u/s 171 of the Indian Contract Act, 1872. In other words, the statutory lien contemplated u/s 59 of the said Act and u/s 171 of the Indian Contract Act both are available to the Port authorities. He submits that in the first case by virtue of Section 61 of the Major Port Trusts Act the power of sale can also be exercised whereas in respect of Section 171 of the Contract Act there is no power of sale. In support of this submission he has referred to two Supreme Court decisions reported in 1999 (7) SCC 359 and 2002 (3) SCC 168 respectively. Mr. Kapoor further submits that total amount due according to the calculation of the Port authorities from 1st January, 2003 till 19th September, 2006 is to the extent of Rs. 7,91,45,770.52p. This amount has been arrived at calculating damages monthwise inclusive of all municipal taxes on land.

7. Mr. Pratap Chatterjee, appearing for the respondent No. 8, while opposing this appeal, contends that the claim made by the Port authorities has no basis as Clause 12 of the Notification No. 470 does not form part of the rent schedule of the land whereas building of the Kolkata Port Trust has been approved by the Central Government. The Port authorities cannot have any lien over the logs and it will appear clearly if Section 59 of the Major Port Trusts Act is read carefully. Section 59 applies in case of rates leviable under this Act for any goods and rent due to the Port. As per definition of rate the same include any toll, due rent, fee for charging leviable under this Act. In this case, the Port authorities have no claim under the Act rather on account of damage for unauthorised occupation. As such claim cannot be termed to be a rate leviable in respect of any goods including any toll, due rent, fee charge under the Act. Hence, Section 59 has no manner of application. He urges that Port authorities are disentitled to the claim of lien on account of damage for alleged illegal, unauthorised occupation inas much as the Port authorities in spite of knowing well that the goods stored in the said godown by the writ petitioner without having any right in respect of the said godown failed to exercise the right of sale of such goods u/s 62 of the Major Port Trusts Act. The respondent, Port authorities, having failed to exercise its right of sale to mitigate loss has lost its alleged claim for damages arising on account of unauthorised use of the said godown by the writ petitioners for storage of goods. No right can be claimed by the Port authorities at this stage for claiming demurrage from the writ petitioner for such alleged illegal and unauthorised occupation. In support of his contention he has referred to a decision of the Supreme Court reported in 2002 (3) SCC 168. He concludes saying that the learned Trial Judge has rightly passed order asking to pay the occupation charges and also providing furnishing of bank guarantee.

8. Mr. J.K. Mitra, learned Senior Advocate appearing for the writ petitioner/respondent No. 1 submits, supporting Mr. Chatterjee's argument that in the order dated 20th February, 2006 the learned Judge has held that the Kolkata Port Trust authorities cannot claim lien over the logs and this fact finding was sought to be challenged in the

cross-objection but it was withdrawn. Therefore, at this stage, prima facie decision of the learned Trial Judge on the question of lien cannot be questioned in this appeal. Actually, order impugned in the appeal was passed for implementation of the earlier order dated 20th February, 2006. The Port authorities should not be permitted to claim any sum in excess of Rs. 31,45,000/- as a condition for releasing the goods. It will appear from the order of 20th February, 2006 that the calculation made by the learned Judge was based on the calculation handed up by the Port authorities. It did not claim any other rate at that stage. Therefore, whatever recorded in the order dated 20th February, 2006 has reached its finality at the interlocutory stage upon withdrawal of the cross-objection by the appellant herein. The present claim of the Port authorities in the appeal for payment is not only illegal and palpably absurd but mala fide also. The amount claimed is sought to be recovered on account of alleged damages not on account of demurrage, which is not permissible under the above law. Mr. Mitra further contends that the claim alleged as against Shaw Enterprises cannot be recovered from the owners of the logs. Shaw Enterprises came into possession when Tisco surrendered the possession in or about 2003. The writ petitioner, bona fide, accepted that the Shaw Enterprises as being the tenant and/or licensee under the Port as they were carrying on business to the notice and knowledge of the Port authorities. Thus, the Port authorities cannot have any claim against the writ petitioner more particularly it cannot have any claim for payment of rent and/or damages prior to April, 2005 or after January, 2006. The Port authorities have illegally contended the goods of the writ petitioner in January, 2006 and is now claiming rent for the subsequent period as would appear from the notes of argument. Such claim could not be permitted for the period when it itself prevented the goods from being removed. The claim for damages is illegal, untenable as the basis thereof is the notification dated 19th September, 1996.

9. We have heard the parties at length and we have considered their respective submissions and have gone through the records. In our view, this appeal should not be allowed as we do not think that there should be any grievance on the part of the appellants. The reasons of our conclusion are as follows.

10. Mr. Kapoor made his submission before us on the points and issues which were not subject-matter of the application for modification. Before us, Mr. Kapoor basically says that Port authority has got lien over the logs for realization of dues. We are of the considered view that such contention cannot be allowed to be agitated before us at the interim stage because of earlier findings of the learned Trial Judge in order dated 20th February, 2006. Learned Trial Judge, in no uncertain terms has recorded prima facie findings that the Port authorities cannot claim any lien over the logs belonging to the writ petitioner. The said findings could have been challenged by Mr. Kapoor's clients in their cross-objection filed against the aforesaid order, but in view of dismissal of the cross-objection filed by his clients, such prima facie findings have reached its finality, and to remain in force till final decision is taken in the writ petition itself.

11. This appeal is arising out of another interlocutory proceeding; so the aforesaid decision of binding nature, though at the interlocutory stage, operates as res judicata in the subsequent stage of the same proceedings. This principle of law is well-settled by a decision of the Hon"ble Supreme Court, reported in AIR 1977 SC 392. It is also settled now principle of Section 11 of CPC applies in the writ proceeding. In this connection one of the judgments of Supreme Court reported in [G.K. Dudani and Others Vs. S.D. Sharma and Others](#), may be referred to. Therefore, until decision is taken by the learned Trial Judge, finally we are to proceed to deal with appeal on the basis that Mr. Kapoor"s client has no lien over the logs.

12. Upon reading of the application made by Mr. Kapoor"s clients for modification, we find that his clients" grievance is neither against the rate adjudged by the learned Trial Judge for payment of occupation charges by the respondent No. 8 in the writ petition nor the mode of payment, nor even for the period of such payment. In the application, on which the impugned order was passed, the following prayers were made:

a) The order of February 20, 2006 passed by the Hon"ble Justice Soumitra Sen be modified and/or varied and/or clarified to the extent that the respondent No. 8, its men, servants and agents or any other person claiming to be the owner of the logs in question lying in the said plots of land of the Kolkata Port Trust shall not be allowed to remove without securing the total dues of rent/damages in terms of the order dated February 20, 2006 of this Hon"ble Court and the balance of dues of rent/damages be directed to secure by way of bank draft to be submitted to the Registrar of this Hon"ble High Court;

b) An interim order of stay of the order dated February 20, 2006 passed by His Lordship the Hon"ble Justice Soumitra Sen till disposal of this application;

13. In order to get the said reliefs, Mr. Kapoor"s clients made the following relevant statements and averments in the said application:

16. The applicants/petitioners further state that in view of what has been stated hereinabove the money i.e. payable for such unauthorised illegal encroachment by the respondent No. 8 and its associates or agents is public money, payment whereof is needed to be secured.

17. The applicants/petitioners submit that the alleged intention of the respondent No. 8 or any other person claiming under or through him, at this stage is doubtful and the port authorities are apprehensive about the bona fide of the alleged intention to clear of the legitimate dues, which is a public money.

18. For non-payment of the dues in terms of the solemn order of the Hon"ble Court, the applicant Port authorities reasonably apprehends that after having the logs released only upon payment of 25% of the total dues, no further payment of the dues of rent will be made by the respondent No. 8 or the writ petitioner.

19. The applicant Port authority, therefore, humbly prays that the respondent No. 8 and/or the writ petitioner should be directed to pay the entire dues of rent of the said period of January, 2003 to January, 2006 at a time in order to have the logs released and to secure the balance dues/claim of rent of the Kolkata Port Trust for the lands in question by way of bank draft to be submitted with the Registrar of the Hon"ble Court.

14. Thus, it is clear that the Port authority really wanted either the entire payment at a time be made or sufficient security for the balance amount of the payment, as adjudged by the learned Trial Judge ought to be furnished before the entire logs are released. Further grievance appearing from the application is that in the event entire logs are released on payment of 25% of the amount adjudged by the learned Trial Judge, Port authority will have no means to recover the balance amount and, as such, the aforesaid reliefs were prayed for.

15. The learned Trial Judge keeping in view the appellants' contention, modified the order securing 75% of the adjudged amount by a bank guarantee. We appropriately quote hereunder the portion of the order of the learned Trial Judge, sought to be impugned:

It is an admitted position today that around Rs. 7,86,000/- have been paid in terms of the order passed earlier, which is equivalent to 25% of the total claim towards rent.

Under these circumstances, the applicant Board is given liberty to encash the said pay order. For the remaining amount of rent and/or occupation charges the respondent No. 8 shall give an unconditional bank guarantee for a sum of Rs. 30,50,000/- (Thirty Lakhs Fifty thousands only) within a period of fortnight from date. This figure has been calculated taking into account of the occupation charges till August, 2006. Upon deposit of the said bank guarantee the applicant Board shall allow the petitioner to remove the logs and for the said purpose the Board shall take all steps including demolition of the said brick wall, if any, which is standing in the way of removing the logs.

16. Therefore, in our view, the relief which was sought for by the appellants by modification application, has been granted. According to us, the appellants before us have raised new point contending that the writ petitioner and/or the respondent No. 8 are liable to pay damages, not the occupation charges as adjudged by the learned Trial Judge, at the rate as they contended before us for the first time. We cannot allow such new contention to be raised before us for it was not the issue before the learned Trial Judge. Such contention may be raised in future when the matter will be heard finally. So, we do not express any opinion regarding statutory lien or general lien over the logs or for that matter whether the charges are to be paid as calculated and adjudged by the learned Trial Judge at the first instance or any amount on account of damage as claimed by the appellant should be paid. The appellant, during pendency of the writ petition is estopped from challenging the decision of the learned Trial Judge adjudging the occupation charges @ Rs. 85,000/- per month. In our view this portion of the decision of the learned

Trial Judge has reached its finality, and will remain so till the final decision is taken by the learned Trial Judge on final hearing of the writ petition.

17. The writ petition is still pending for hearing. The appeal against an interlocutory order has been heard by vis and the goods are still lying within the area of the Port authority, but we think that in view of passage of time, additional order is required to be passed. Therefore, we dispose of this appeal by the following order.

18. The learned Trial Judge directed to furnish unconditional bank guarantee, we direct it must be by a nationalised bank.

19. In addition to furnishing bank guarantee in any nationalised bank for the amount of Rs. 30,50,000/- (Thirty Lacs Fifty thousand) the writ petitioner and/or the respondent No. 8, whosoever may be, shall also furnish bank guarantee in any nationalised bank for the amount calculated from September, 2006 till the date of passing of this order @ Rs. 85,000/- per month. On furnishing the bank guarantee in terms of the order of the learned Trial Judge as slightly modified, as well as this order, the logs which are lying within the area of Port authority shall be allowed to be released. Such bank guarantees shall be renewed from time to time, if necessary. For this purpose, Port authority shall render all assistance to the writ petitioner and/or the respondent No. 8.

20. No one except the writ petitioner has come forward for release of logs and other added private respondents have no objection to the logs being released to the writ petitioner. The Port authority says that they have no concern about the goods if they are paid off their dues.

21. We have passed this order for furnishing further bank guarantee in view of the fact that the writ petitioner did not take any steps for expeditious hearing of the writ petition finally, which is pending before the learned Trial Judge till today, although there was no restrain order from proceeding with the hearing of the writ petition. Had this matter been heard out by this time the occupation charges would have been minimized because storing of logs would not have continued. Therefore, there is lapse on the part of the writ petitioner for taking action as we feel that the writ petitioner is not also willing to get this matter adjudicated finally and to get the logs released.

22. In addition thereto, the writ petitioner and/or the respondent No. 8 shall also furnish a bond undertaking to pay to the Port authority, the additional or surplus amount, if any adjudged by the learned Trial Judge, in excess to the amount adjudged by the learned Trial Judge previously.

23. Thus, the appeal is disposed of without any order as to costs. All the orders passed by the learned Trial Judge earlier shall remain untouched, save and except the aforesaid modification by way of addition because of passage of time, during which this appeal was pending. It would also be open for the writ petitioner or the respondent No. 8, if so think fit, to deposit the entire amount covered by the bank guarantee in lieu of furnishing bank

guarantee.

24. There will be no order as to costs.

25. After the judgment is delivered, Mr. Kapoor, learned Senior Counsel appearing for the Port authority prays for stay of operation of this judgment and order. Mr. Mitra, however, opposes such prayer.

26. Since the matter was heard for some time and was also pending for some time, therefore, we think there will be no harm if operation of this judgment and order is stayed for a period of three weeks from date. Accordingly, operation of this judgment and order is stayed for a period of three weeks from date. However, if any loss occurs consequent upon granting of stay that will obviously be borne by the Port authority. However, the same will be subject to the order to be passed by the learned Single Judge.

Urgent xerox certified copy of this order, if applied for, be supplied to : the applicants.

K.J. Sengupta & A.K. Bhattacharya, JJ.