

(1999) 07 CAL CK 0041**Calcutta High Court****Case No:** Matter No. 80 of 1994

P.G. Modak

APPELLANT

Vs

Board of Trustees for The Port of
Cal.

RESPONDENT

Date of Decision: July 20, 1999**Acts Referred:**

- Customs Act, 1962 - Section 147(3), 28
- Major Port Trusts Act, 1963 - Section 56, 56(1)

Citation: 2 CWN 140 : (1999) 114 ELT 799**Hon'ble Judges:** Ajoy Nath Ray, J**Bench:** Single Bench**Advocate:** Ghosh, for the Appellant; Roy Chowdhury, for the Respondent**Judgement**

Ajoy Nath Ray, J.

This is an application made by a Customs House Clearing Agent for relief from certain bills raised on them by the Port Authorities, the amounts thereof aggregating some Rs. 11 lac. and odd.

2. The bills cover clearances made by the agent during the months of April to July, 1988. Prior to May, 1988 the Port Authorities allowed 15 days free time for storing full container loads on Port areas.
3. From May, 1988 the time was abridged to 7 days only.
4. When the concerned goods were cleared, however, the Port Authorities raised bills on the writ petitioners allowing them 15 days free time for storage.
5. The storage charges for the days in excess of 15 were duly paid and the goods cleared. The writ petitioners thereafter delivered the goods to the parties for whom they were acting as agents in the Customs House and the Port areas. It appears that these parties who had imported the goods were certain Agarwalas of Cotton Street.

6. One year later the Port Authorities discovered their mistake and raised bills aggregating the aforesaid amount, asking for settlement thereof.

7. The writ petitioners corresponded to this effect that as the principals of whom they were agents had already taken away the goods, there was hardly any way left to them for obtaining reimbursement; but they asked for time for settlement of the bills of the Port Authorities.

8. Correspondence went on for a long time and in the end when the threats of the Port Authorities were becoming imminent, the writ was filed in 1994.

9. Mr. Ghosh appearing for the writ petitioners has submitted that as clearing agents, his clients" duty came to an end with clearance of the goods. Service of notices and bills on them after such completion of their duties is not permissible. He relied in this regard on the case of Collector of Customs, Cochin Vs. Trivandrum Rubber Works Ltd., , drawing the Court's attention specially to paragraphs 9 and 10 of the judgment.

10. According to Mr. Ghosh his clients are disclosed principal agents. They cannot be made liable for storage charges of containers belonging to their disclosed principals, whose name as consignees were always apparent from the respective bills of lading.

11. Mr. Ghosh also submitted that though the Port Authorities have stated in their affidavit that the Notification abridging the free lay time is said to have been first published in March, 1988, yet his clients are not aware of any such Notification; if the respondents wish to rely upon it, they should produce the Notification in a true copy instead of giving only its number and date in a paragraph in the affidavit.

12. Mr. Roy Chowdhury appearing for the Port Authorities submitted that the dues aggregating above Rs. 11 lac. were never disputed in its substance by the writ petitioners. All that they asked for was time for payment, until the very last letter was written prior to filing of the writ.

13. Mr. Roy Chowdhury showed several Port bills from as early as August, 1988 wherein the free storage time allowed to the writ petitioners was only 7 days for full container loads. Thus, according to Mr. Roy Chowdhury the writ petitioners all along knew that they were enjoying excess periods of free laying.

He showed that in document after document (sic) the writ petitioners have described themselves as consignees so far as the Port Authorities are concerned. They have undertaken therein to a undercharged amounts, if any. According to Mr. Roy Chowdhury, these documents constitute contracts and agreements by reason of which Mr. Ghose"s clients can be made liable even if their principals are disclosed in regard to the consigned goods. In this regard to Mr. Roy Chowdhury referred to documents like cash import delivery challan, shed delivery order, etc. wherein the writ petitioners have signed themselves as consignees.

14. Mr. Roy Chowdhury relied upon Section 56 of the Major Port Trusts Act which allows recovery of short levied charges. The said section is as follows :-

"56. Notice of payment of charges short-levied or erroneously refunded. - (1) When any Board is satisfied that any charge leviable under this Chapter has been short-levied or erroneously refunded, it may issue a notice to the person who is liable to pay such charge or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that no such notice shall be issued after the expiry of two years, -

(a) when the charge is short-levied, from the date of the payment of the charge;

(b) where a charge has been erroneously refunded, from the date of the refund.

(2) The Board may, after considering the representation, if any, made by the person to whom notice is issued under Sub-section (1), determine the amount due from such person and thereupon such person shall pay the amount so determined."

15. He also relied upon the by-laws of the Commissioners for the Port of Calcutta, 1949, which are still current under the trustees. He referred to by-law 55A, the relevant portion of which is as follows :-

"55A. ...The Traffic Manager may before the issue of such a licence, ask the clearing agent to satisfy him that the applicant has already obtained the requisite licence from the Customs authorities and also call upon the clearing agent to furnish a bond with a security deposit of Rs. 500 as a guarantee for (a) the faithful and proper behaviour of himself and of his sircars, clerks, servants or agents in regard to compliance with the Port Rules, by-laws and other regulations of the Commissioners for the time being in force and all other statutory provisions and (b) making payment immediately on demand of any of the Commissioners" dues on consignments shipped, cleared or forwarded as the case may be and of all sums due to the Commissioners on such consignments. The Traffic Manager may if he is satisfied about the misbehaviour of a clearing agent or any of his sircars, clerks, servants or agents, or about the non-fulfilment of any of the terms or conditions herein contained, suspend, withdraw or revoke the clearing agency licence issued to him,...".

According to Mr. Roy Chowdhury if the unpaid amounts are not paid up by the writ petitioners they render themselves liable to cancellation of the clearing agency licence.

16. The bonds of Rs. 500/- or so executed by the clearing agent might be also forfeited.

17. Regarding the above case of Trivandrum Rubber Mr. Roy Chowdhury submitted that case was concerned with customs duty and not port charges. u/s 28 of the

Customs Act, the person chargeable with the duty was to be given notice; and as per proviso to Sub-section (3) of Section 147 of that Act, the Custom House clearing agent would not be a person chargeable to such a duty unless, in the opinion of the Assistant Collector of Customs the duty could not be recovered from the importer himself. Thus, Mr. Roy Chowdhury submitted that it would not be right to apply the observations of the Supreme Court out of context. Although the agent was relieved of all duties relating to customs, yet for the same reason he cannot be relieved of port duties.

18. In regard to his submissions on the Supreme Court case, in my opinion, Mr. Roy Chowdhury is quite correct. However, it does not appear that when the writ petitioners cleared the goods between April and July, 1988, they had cleared any goods paying full container load storage for periods beyond seven days. The first bills relied upon by Mr. Roy Chowdhury in this regard are bills of August, 1988.

19. Also there is no imputation of deliberate fraud against Mr. Ghose's clients. The correspondence shows that they tried to recover the money from the real importer but failed to obtain it or pass it on to the Port Authorities.

20. From the facts on record there can be no real doubt or dispute about this, that the Port Authorities and their concerned employees raised the original undercharging bills on a mistake which was not deliberate and further that the goods were got cleared by Mr. Ghose's clients on the basis of those mistakes, without those being detected by the writ petitioners at the material time. It is nobody's case that the mistake of the respondents was detected by the writ petitioners at the material time and yet they allowed themselves to be put in a precarious condition by suppressing the mistake. Such a conclusion as this would be mere suspicion or conjecture not borne out by any of the documents.

21. There was thus equal mistake on the part of the petitioners and the respondents as a result of which the writ petitioners today are likely to face claims of above Rs. 11,00,000/- if this writ fails.

22. The writ Court is also a Court of equity. Equitable principles can be resorted to by the writ Court

23. A doggerel will be found in the famous lecture on Equity delivered by Prof. Maitland some 100 years ago which runs as follows :-

"Three things find place, In the Court of conscience, Fraud, mistake and Breach of confidence."

24. It is a quotation from Sir Thomas More although that famous Chancellor is better known of this side of the pacific as the Man for all Seasons, Although in the above verse there is an element of the wag, yet the substance of the verse is at the very heart and core of equity.

25. Relief from mistake is a well known equitable jurisdiction which has been exercised for hundred of years in courts of Equity.

26. In the facts of this case it appears that the mistake was made by Mr. Ghose's clients at the point of time when a changed notification was coming into being. There is no case made by the respondents that Mr. Ghose's clients have tried to evade storage charges either beyond seven days for periods subsequent to March/May, 1988 or for periods beyond 15 days for the period prior to March/May, 1988. These instant bills are in the nature of exceptional mistakes committed by both parties.

27. In my opinion, for these reasons Mr. Ghose's clients are entitled to the relief from such mistake. The writ petition accordingly succeeds. There will be rule absolute in terms of prayers (b), (c) and (d) of the writ petition.

28. There will be no order as to costs.

29. All parties and all others concerned to act on a signed xerox copy of this dictated order on the usual undertakings.