
(2011) 09 MAD CK 0354

In the Madras High Court

Case No : O.S.A. No's. 306, 307 and 308 of 2008 and M.P. No's. 1 to 1 of 2008

Caravel Shipping Services (P) Ltd.

APPELLANT

Vs

Shamim Darya Arya for Liberty Amadeus House Floral Street
Covent Gareon London WCZE 9DP UK, Indus Resources (P)
Ltd 526-527, Vyapar Bhavan 49, P.D'Mello Road Carnac
Bundar, Mumbai - 400009, Green Land Sea Multi Cargo
Shipping Agencies 11 and 12, Morabia Commercial Centre
Plot No.44, Sector 9-A, Ghandhidham Kutch 370 201 and
Mundhra Container Freight Station (P) Ltd. Bharath C.F.S.
Zone-I Gujarat Adani Port Limited Mundra, Kutch - 370421

RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 9
Contract Act, 1872 — Section 151, 152, 161, 171
Customs Act, 1962 — Section 150, 2(2), 48
Major Port Trusts Act, 1963 — Section 2, 51, 59, 61

Citation : (2011) 09 MAD CK 0354

Hon'ble Judges : R. Banumathi, J;B. Rajendran, J

Bench : Division Bench

Advocate : T.V. Ramanujun, for Mr. M. Narayanasamy, for the Appellant; P. Giridharan for R4, for the Respondent

Final Decision : Dismissed

Judgement

B. Rajendran, J.—These Original Side appeals are filed challenging the common order dated 30.06.2008 passed by the learned single Judge dismissing the O.A. No. 320 of 2008 as well as the Application Nos. 1447 and 1448 of 2008 filed by the appellant herein.

2. (i) According to the appellant, the first respondent is the shipper. The second respondent is the importer of the goods shipped by the first respondent. The third respondent is the clearing and forwarding agent. The fourth respondent namely Mundhara Container Freight Station is a garnishee, according to the appellant. According to the appellant, the second respondent approached them

at Chennai and requested to arrange 32 Nos. of 40 feet containers for loading coal into those containers from Bandar Abbas in Iran to Mundra (Gujarat), India. The bill of lading were also raised even in the year 2005. On 27.09.2005, consignments were also loaded in the vessel as per the Bill of lading from the Port of Bandar Abbas and the cargos were unloaded at the Port of Mundra on 30.09.2005. According to the appellant, the consignment was not claimed by the consignee in spite of reminders sent. Therefore, as per Section 48 of the Customs Act, 1962, the fourth respondent decided to sell the goods after obtaining approval from the consignee, the first respondent. Subsequently, the goods were auctioned with the permission of the customs department. According to the appellant, the actual amount received in the auction sale was not intimated or not made known to the appellant, excepting the fact that the goods were sold in public auction.

(ii) According to the appellant, since they are the owners of the 32 containers, retaining the containers is illegal especially after the goods in the containers were auctioned by the fourth respondent and the proceeds realised. The fourth respondent did not return the containers after de-stuffing the goods, on the other hand, intended to sell the containers itself under the pretext of recovering the amount due and payable to them towards demurrage charges, which is arbitrary and illegal. According to the appellant, the fourth respondent has violated Section 150 of the Customs Act inasmuch as, whenever there is a sale in respect of any goods, as per the Customs Act, the amount should have been appropriated proportionally by the fourth respondent and therefore the container ought to have been released to the appellant. In any event, detention of the containers by the fourth respondent is arbitrary and uncalled for.

(iii) The appellant would further contend that they have only leased the containers to the second respondent for transporting the goods of the first respondent, for which, the third respondent acted as clearing and forwarding agent. The moment the customs authorities de-stuffed the goods from the containers, as owner of the containers, the appellant ought to have been given the custody of the containers. Further, if at all there is any dues to the custom authorities or the fourth respondent, they can have lien only over the goods and not the containers used for transporting the goods. As per the contract between the appellant, first respondent and second respondent, the matter has to be referred to an arbitrator and therefore, before invoking the arbitration proceedings, as the very containers are sought to be auctioned by the fourth respondent, which are being kept in the yards of the fourth respondent without any care and the containers also suffered huge damages, they have filed the applications O.A. Nos. 320, Application Nos. 1447 and 1448 of 2008 before the learned single Judge. O.A. No. 320 of 2008 was filed praying for grant of an interim injunction restraining the respondents 1 and 2 or any one claiming under them or on their behalf from in any way alienating or encumbering the above said 32 Nos. 40 feet empty containers lying in the custody of the fourth respondent morefully described in the Bill of lading dated 27.09.2005.

Application No. 1447 of 2008 was filed praying to issue a prohibitory order, prohibiting the fourth respondent/garnishee from parting with the 32 empty containers lying in their custody to any one else pending the arbitration proceedings. O.A.No. 1448 of 2008 has been filed praying to appoint an advocate commissioner to go and take an inventory of the above said 32 Nos. 40 feet empty containers, which are in the custody of the fourth respondent, morefully described in the Bill of lading dated 27.09.2005 and note down its existing condition and take custody of the same and hand over the same to the appellant.

(iv) According to the appellant, on 11.04.2008, as per the orders passed by this Court, the advocate commissioner inspected the containers and submitted his report. As per the report, out of the 32 containers, 30 containers are in a damaged condition. Inspite of such report of the advocate commissioner, the learned single Judge, without any valid reasons, vacated the interim order originally granted and dismissed all the aforesaid applications filed by the appellant.

3. Before the learned single Judge, the fourth respondent alone contested the applications and the other respondents did not participate in the proceedings. Even before us, the fourth respondent alone filed counter in these three appeals on the same lines and contested the appeals. The respondents 1 to 3 are not represented by any one even though they were served.

4. (i) According to the fourth respondent, this Court has no jurisdiction to entertain the applications filed by the appellant as no part of the cause of action has arisen within the jurisdiction of this Court. According to the fourth respondent, there was a due of more than Rs.2 crores, which is payable by the appellant as well as the respondents 1 to 3 towards container storage incidental charges. The goods were in the container freight station of the fourth respondent for more than two years for which the appellant and the respondents 1 to 3 are liable to pay demurrage charges. As far as invocation of the clause for arbitration contained in the agreement between the parties, the fourth respondent would contend that they are neither a signatory to the agreement nor party to the agreement between the appellant and the respondents 1 to 3 and therefore, the provisions of the Arbitration and Conciliation Act cannot be pressed into service as against the fourth respondent. The fourth respondent would mainly contend that they are not garnishee, as alleged by the appellant and they are only an extended arm of the Port Trust and they enjoy all the liens as enjoyed by the Port Trust u/s 2 and Section 59 of the Major Port Trusts Act. The fourth respondent is only the custodian of the goods and as per the provisions of the Major Port Trust Act, in respect of the dues payable to the Port Trust, the authorities have lien over the containers and the cargo, subject to other obligations under the Customs Act. The cargo itself was brought for auction only after obtaining permission from the customs authorities and the proceeds were paid to the customs authorities towards duty under the provisions of the Customs Act. Further, the expression "goods" defined u/s 2(2) of the Customs Act, will also

include the containers inasmuch as the goods includes all movable properties. The fourth respondent has got lien and right to retain and sell the property namely the containers u/s 51 of the Major Port Trusts Act and such lien cannot be called in question by the appellant.

(ii) According to the fourth respondent, they are the bailee for reward and has a right of general lien over the goods bailed. Therefore, the fourth respondent has a right even u/s 151, 152 and 161 and 171 of the Indian Contract Act. The failure on the part of the importer to clear the goods and re-export the container cannot defeat the rights of the Port Trust or its extended arm, being the fourth respondent, for recovering the rental charges due to them. Therefore, the fourth respondent would contend that the learned single judge is justified in dismissing the applications and prayed for dismissal of the appeals.

5. We have heard the learned Senior counsel for the appellant as well as the learned counsel for the fourth respondent.

6. The contention of the appellant is that they are the owners of the containers, gave the containers on hire to the second respondent for shipment of the goods of the shipper namely the first respondent. Therefore, the moment the goods de-stuffed into the containers were sold and the proceeds appropriated by the customs authorities towards non-payment of customs duty, the appellant is automatically entitled to get back the containers. As per the agreement between the appellant and the respondents 1 to 3, it is the duty of the shipper to re-ship the empty containers after de-stuffing the goods. In the process, if the parties have not cleared the goods or not paid the dues, definitely the customs authorities have got a lien over the goods, but that lien would be only in respect of the goods, which were sent through the containers and such lien cannot be extended or stretched to retain the containers. The containers were lying in the private ware house of the fourth respondent, a bonded ware house authorised by the customs authorities. The fourth respondent, being an extended arm of the Port Trust for keeping the containers, cannot have any special right to detain the containers when the containers cannot be called or termed as "goods" within the meaning of section 2(2) of the Customs Act. Therefore, the fourth respondent cannot have any lien over the containers to realise or adjust the customs duty payable by the importers or exporters, especially when the goods in the containers were de-stuffed, sold in public auction and the proceeds were realised. According to the learned Senior Counsel for the appellant, the detention of the containers for over a period of two years by the fourth respondent, after sale of the goods is improper. Furthermore, as there is a clause for arbitration in the agreement entered into between the appellant and the respondents 1 to 3, the fourth respondent, even though is not a party to the agreement, inasmuch as the containers are in their custody, which is the subject matter of the arbitration proceedings, the relief sought for in the applications, pending a decision in the application u/s 9 of the Arbitration and Conciliation Act, ought to have been granted by the learned single Judge. Though the learned single Judge originally

appointed an advocate commissioner and a report was also filed by the advocate commissioner stating that the containers are in a very bad condition and not maintained properly by the fourth respondent, the dismissal of the applications by the learned single Judge has highly prejudiced the appellants. The learned single Judge failed to consider the irreparable hardship and injury that may be sustained by the appellant due to non-release of the containers. The learned senior counsel for the appellant also brought to the notice of this Court that already the appellant has invoked the clause contained in the agreement for appointment of an arbitrator by filing O.P. No. 83 of 2009 and the matter is still pending for appointment of an arbitrator. Section 171 of the Contract Act will not be applicable to the facts of the case in hand since the fourth respondent cannot be construed as a bailor. In this context, the learned Senior counsel for the appellant relied on the decision of the Honourable Supreme Court reported in (Sun Export Corporation and another vs. Board of Trustees of the Port of Bombay) AIR 1998 SC 92 as well as the decision of the Division Bench of the Calcutta High Court reported in (Imsa Shipping Agency Private Limited vs. Commissioner of Customs) (2002 (84) ECC 581. The learned Senior counsel for the appellant relied on the decision of the Supreme Court referred to above for the proposition that the goods are not available to the Port Trust for appropriation towards their dues namely demurrage charges. It was further held that even in the case of confiscated goods, the sale price could be adjusted towards demurrage charges cannot be accepted as the goods once confiscated by the customs authority, it was not available for the Port Trust for appropriation of their dues.

7. The learned Senior counsel for the appellant also brought to the notice of this Court that in the judgment of the Division Bench of the Calcutta High Court mentioned supra, it was held that goods, as defined u/s 2(2) of the Customs Act is different from "containers" and the containers cannot be construed as goods. Further, the containers cannot be confiscated even if it contains smuggled goods. Therefore, according to the learned Senior counsel for the appellant, the non-release of the containers by the fourth respondent for a longer period is unjustified, which was not properly considered by the learned single Judge.

8. On the contrary, the learned counsel appearing for the fourth respondent mainly contended that the words "goods" mentioned in the Customs Act would not mean not only the goods imported, but also include the containers as it is clearly stated therein that the goods includes all movable property. Further, the conduct of the appellant is not that of a owner of the containers because the goods itself have come to India under the bond of the appellant. This was pointed out by the learned counsel for the fourth respondent by relying on an e-mail sent by the appellant to the second respondent, a copy of which was also marked to the first respondent. The e-mail reads as follows:

Please arrange to send your No Objection mentioning reason to abandon the cargo at Mundra enable to proceed for further steps to de-stuff/auction the cargo

as per the Indian Customs Laws to atleast recover/minimise our losses.

Please note that 32 X 40" FCL arrived under Mr. Devariya's Bond and 08X40" CFL arrived under Caravel bond and you are requested to send NOC to both the parties.

Your co-operation is awaiting.

9. From the e-mail, it is very clear that the goods reached India under the bond of Devariya and the appellant themselves. If really the appellant's contention is that they have only rented out the containers, it need not have reached India with the bond executed by the appellant. Therefore, the appellant acted more than as a rental agent for the container. However, we are not expressing any opinion in this application.

10. Another e-mail sent by the appellant to the customs authority is also pointed out by the learned counsel for the fourth respondent. In that letter dated 27.11.2006, it is clearly stated that the goods were brought to India through their agency M/s. Greenland Multi Cargo Shipping Agency namely the third respondent herein. It is further stated that after the goods landed, the consignee refused the cargo and therefore, they wanted to de-stuff the cargo to enable them to use the containers.

11. These two letters sent through e-mail would clearly indicate that the third respondent has also acted as an agent for the appellant, who is also the agent for the second respondent. Therefore, as rightly pointed out by the learned single Judge, the relationship between the appellant and the second respondent is only that of a persons hiring container cannot be accepted.

12. The learned counsel for the fourth respondent mainly contended that the mainly contended that they are the extended arm of the Port Trust, which has its bonded ware house where goods are kept. They were maintaining and handling goods inspite of paucity of space and therefore, they are entitled for claiming demurrage charges for maintenance of the containers. In this case, admittedly, demurrage charges have not been paid. No doubt, it is true that the goods in the containers were de-stuffed, sold in public auction and the proceeds were adjusted towards payment of customs duty. As far as the fourth respondent is concerned, they are entitled for the demurrage charges for the maintenance of the goods for a longer period. The fourth respondent also filed a suit before the Civil Court at Bhuj, Gujarat for recovery of the dues. Only to circumvent the suit, the appellant has filed the three applications before the learned single Judge.

13. As far as the fourth respondent is concerned, they are not in any way governed by the agreement entered into between the appellant, respondents 1 to 3, which contains a clause for arbitration. The fourth respondent is neither a signatory to the application nor a party to the same, therefore, Section 9 of the Arbitration and Conciliation Act, 1996 would not apply as against the fourth respondent. Since the application filed u/s 11 of the Arbitration and Conciliation

Act is pending, these issues can only be decided in the said application u/s 11 of the Arbitration and Conciliation Act. If the appellant intends to raise their grievance, it is open to them to contest the suit said to have been filed by the fourth respondent before the Civil Court at Bhuj, Gujarat.

14. The learned counsel appearing for the fourth respondent relied on the decision of the Honourable Supreme Court reported in *The Board of Trustees of The Port of Bombay and Others Vs. M/s Sriyanesh Knitters*, wherein it was held by the Honourable Supreme Court that the nature of lien with the Board is for the dues regarding the imports. The Honourable Supreme Court also considered the scope of Section 59 and 61 of Major Port Trust Act and Section 171 of the Contract Act. It was held that Section 59 and 61 of the Major Port Trust Act do not provide for general lien, what is provided in Section 59 is only a specific lien on specific case and not a general lien. At the same time, the Honourable Supreme Court also held that u/s 171 of the Contract Act, general lien is provided and it would apply to the provisions of Major Port Trust Act also. Therefore, applying the ratio laid down by the Honourable Supreme Court in the above decision, if there is any amount due and payable, the same would be recovered as general balance of amount in respect of which the Port Trust has got a lien over the goods bailed out. In fact, the learned single Judge also relied on this judgment and came to the conclusion that Section 171 of the Contract Act would apply to the facts and circumstance of the case.

15. The learned Senior counsel for the appellant would contend that Section 171 of the Contract Act would not apply to the case as the "goods" will not mean and include the "container" and the container stands in a different footing. We are unable to accept this submission of the learned Senior counsel for the appellant. In this case, application u/s 9 of the Arbitration and Conciliation Act, 1996 was filed in which the fourth respondent is not a party. The fourth respondent also filed a Civil Suit for recovery of the dues before the Civil Court at Bhuj, Gujarat and if at all the appellant is aggrieved, it is open to the appellant to contest the suit filed by the fourth respondent. Therefore, we are refraining from making any observation in this regard, however, we give liberty to the appellant to raise all the contentions in the suit. Suffice it to say, as far as the fourth respondent is concerned, being an extended arm of the Port Trust, is entitled to seek for demurrage for the period during which the containers were kept in their custody.

16. The learned single Judge also relied on the decision of the Honourable Supreme Court reported in *Seahorse Shipping and Shipmanagement Pvt. Ltd. and Another Vs. The Board of Trustees for the Port of Calcutta and Others*, and held that after the decision of the Honourable Supreme Court, on the scope of Section 59 of the Major Port Trust Act, it is no longer *res integra* that the right of the Port Trust under that Section is limited only to the specific goods. Therefore, the Port Trust and the fourth respondent, as an extended arm, could proceed as against the specific goods. The learned single Judge also rightly pointed out that the tripartite agreement between the appellant, respondents 1 to 3 cannot bind

the statutory authorities, including the fourth respondent, who extended the services on behalf of the Port Trust. Therefore, we do not find any reason to interfere with the reasoned order passed by the learned single Judge. However, liberty is given to the appellant to raise all their contentions in the suit, said to have been filed by the fourth respondent before the Civil Court at Bhuj, Gujarat State in which the appellant is also a party.

17. With the above observation, the Original Side Appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.