

(2015) 03 DEL CK 0259
In the Delhi High Court
Case No : CS (OS) 1397/2000

Shipping Corpn. of India

APPELLANT

Vs

Monica India and Others

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Contract Act, 1872 — Section 170, 171, 73
Customs Act, 1962 — Section 155, 45(2)(b)
General Clauses Act, 1897 — Section 3(22)
Limitation Act, 1963 — Section 2(h)
Major Port Trusts Act, 1963 — Section 131, 59, 61

Citation : (2015) 5 AD 254

Hon'ble Judges : Jayant Nath, J.

Bench : Single Bench

Advocate : Shantanu Sagar, for the Appellant; R.K. Sonkiya, Advocates for the Respondent

Judgement

Jayant Nath, J.—The plaintiff has filed the present suit for recovery of Rs. 83,29,000/- for alleged detention charges upto to the date of the filing of the suit. A decree is prayed for against defendants No. 1 to 5 to pay jointly and severally the said amount. Regarding defendant No. 6, it is prayed that the suit be decreed against the said defendant for such amount as this court may think fit of the amount claimed.

2. As per the plaint the plaintiff is a Government owned shipping company. It is averred that defendant No. 1 a firm imported consignments under three different Bills of Lading. Defendants No. 2 to 5 were the partners of defendant No. 1 on the date of import of the consignments. Defendant No. 6 is UOI, the Collector of Customs.

3. The following consignments were shipped by the plaintiff on the request of defendant No. 1:-

(i) Consignment from Korea under Bill of Lading No. CBK-31 dated 28.12.1990 in

the vessel "M/v Pamella-II" in six containers of 40 feet each and one container of 20 feet. The consignment arrived on 21/25.2.1991 and bill of entry was filed on 23.2.1991.

(ii) Consignment from Taiwan under Bill of Lading No. ICD-KEBM-4(A) dated 31.12.1990 in six containers, each of 20 feet in the vessel Jalgodavari. The consignment arrived on 10.3.1991 and Bill of Entry was filed on 19.4.1991.

(iii) Consignment from Taiwan under Bill of Lading No. ICD-KEBM-9(A) dated 05.02.1991 in six containers, each of 20 feet. The consignment arrived on 1.4.1991 and Bill of Entry was filed on 21.3.1991.

4. The containers were provided by the plaintiff. Reliance is placed on the India-Pakistan-Bangladesh-Ceylon Tariff (IPBC Tariff) and shipping practice to state that as per the Bill of Lading a delivery order is valid for 5 days. Defendants No. 1 to 5 on release of such an order were required to take delivery of the consignments within five days free of any detention charges. In case of delay, they were obliged to pay detention charges for the said containers as follows:-

5. The claim of the plaintiff is restricted to the consignments as contained in the Bill of Lading dated 28.12.1990 and 31.12.1990. Defendants No. 1 to 5 were supposed to pay freight and other charges and were required to obtain the delivery order and take the delivery of the consignments within five days of the arrival of the containers. It is averred that defendants No. 1 to 5 failed to take delivery of the consignments within the stipulated time. Accordingly, the defendants become liable to pay detention charges.

6. It transpires that certain disputes arose between defendants No. 1 to 5 and the Custom Department, namely, defendant No. 6. The said consignments were detained by defendant No. 6. A show cause notice was issued by defendant No. 6 on 29.8.1991.

7. Thereafter a legal battle started between defendants No. 1 to 5 and defendant No. 6. Defendants No. 1 to 5 filed a writ petition before this High Court being CWP No. 3277/1992 in September 1992 against defendant No. 6 the Customs Department. This petition was disposed of on 23.04.1993. The court directed that fresh samples of the goods be taken within two weeks and the goods be released forthwith on furnishing PD bonds and Detention Certificate be granted to the petitioner therein. An undertaking was recorded that in case the Collector (Customs) finds that customs duty and redemption duty are payable by the petitioner therein (defendants No. 1 to 5 herein), the petitioner would pay the same subject to right to appeal. In view of the said order, the detention certificate was issued to defendants No. 1 to 5 on 08.06.1993. It is urged that in the meantime the detention charges continued to mount. On a special request of defendants No. 1 to 5, substantial concessions in detention charges were made. Defendant No. 1 was requested to pay the concessional detention charges and get the delivery order re-validated but to no avail.

8. In June 1995, defendants No. 1 to 5 again approached the plaintiff with a fresh detention certificate but they again wanted delivery of the goods without paying detention charges. These requests were hence turned down by the plaintiff.

9. Thereafter writ petition No. 3057/1995 was filed before this High Court by defendant No. 1 whereby the relief of waiver of the detention of charges levied by the plaintiff was sought. This court disposed of the said matter on 24.08.1995. Relying on the judgment of the Supreme Court in International Airports Authority of India and Others Vs. Grand Slam International and Others, it held that it may not be possible to accede to the prayer of defendant No. 1 for release of the consignment by waiving demurrage charges. As it was claimed that the fault was of the Customs Department, Defendant No. 1 was permitted to file a fresh petition stating the claim against the Custom Department.

10. In the meantime, another firm by the name Sanjeev Woollen Mills of which defendants No. 2 to 5 are also partners got embroiled in a litigation with defendant No. 6, for a similar consignment. Defendant No. 6 in a writ petition filed by the said Sanjeev Woollen Mills being CWP No. 802/1991 had given an undertaking on 03.04.1991 that if the goods in the consignments there under are not found to be synthetic waste then the entire demurrages and containers charges will be borne by the Customs Authorities. Sanjeev Woolen Mills on 11.8.1995 received a favourable order from CEGAT. Prompted by the said undertaking of defendant No. 6 in CWP 802/1991 and order of the CEGAT in the case of Sanjeev Woollen Mills defendant No. 1 filed yet another writ petition before this court being CW No. 3916/1995. In this writ petition it was prayed that the Customs Authorities be directed to make the payment of detention charges to the plaintiff. This writ petition was however withdrawn on 19.03.1997 with liberty to approach the court again if the need arises.

11. It is averred that having not succeeded in the writ petitions to get any relief against the plaintiff, defendants No. 1 to 5 on 23.04.1998 acknowledged the factum of payment of detention charges and offered to pay Rs. 8,000/- per container. The said offer was rejected by the plaintiff. Plaintiff finally sent a legal notice dated 04.02.1999 to defendants No. 1 to 5 claiming its dues. Defendant No. 1 replied denying the averments in the legal notice on 8.3.1999 and denied their liability. Thereafter the present suit has been filed. Thought the plaint urges that a total amount of Rs. 10.27 crores is payable up to 10.03.2000 by defendants No. 1 to 5, the plaintiff claims only Rs. 83.29 lacs as detention charges for the consignments in respect of three years immediately preceding to the filing of the suit.

12. The defendant nos. 1 to 4 filed a separate written statement. They have pleaded that the suit is barred by limitation as the Customs Department/ defendant no. 6 had issued detention certificates on 29th May, 1993 and 8th June, 1993. It is averred that the said defendants approached the plaintiff for release of goods and also wrote a letter dated 30th June, 1993 with the same

request. It is urged that since 30th June, 1993, the detention of the goods was only on account of the illegal acts of the defendant no. 6. It is further urged that the plaintiffs were bound to release the goods in 1993, and now having filed the suit in the year 2000, the same is barred by limitation.

13. Further, heavy reliance is placed on the judgment of the Supreme Court in the case of Union of India and Others Vs. M/s. Sanjeev Woollen Mills, to submit that the facts of the present case are exactly akin to the facts of Sanjeev Woollen Mills (supra) and hence, defendant no. 6/Customs Department would be liable for detention and demurrage charges, if any as directed in that case by the High Court and upheld by the Supreme Court.

14. It is stated that several such consignments were imported earlier and were got released without detention or demurrage charges. It is further stated that the goods were detained by defendant no. 6/Customs Department due to mala fide reasons to harass the defendants on the false excuse that the containers did not contain the goods described. It is stated that an illegal demand of Rs. 50 lakhs was made by one of the officials of the Customs Department for release of the goods and that is why goods were needlessly detained by the Customs Department.

15. The defendant no. 6/Customs Department also filed the written statement. They have stated that the suit is barred under Section 155 of the Customs Act. They have relied upon the judgment of the Supreme Court in the case of International Airports Authority of India and Ors. vs. Grand Slam International and Ors., (supra). It is averred that the Customs Department is not concerned with the demurrage charges or detention charges. The goods were not cleared as there was a dispute on the quality and value of goods involving huge government revenues and the action of the Customs Department was bona fide.

16. At the time of import of the consignments defendant no. 5 was a partner of defendant No. 1. Somewhere thereafter he has exited from defendant No. 1. His right to file written statement was closed on 4.2.2003.

17. Based on the above pleadings, the following issues were framed on 26th July, 2010:-

1. Whether the plaintiff is entitled to recover Rs. 83,29,000/- from defendants no. 1 to 5? If so at what rate of interest? OPP
2. Whether the present suit is barred by Section 155 of the Customs Act? OPP
3. Whether this suit is barred by time? OPD-1 to 4
4. Whether there is no privity between the plaintiff and defendants no. 1 to 4? OPD-1 to 4
5. Relief.

18. It may also be noted that on the same date i.e. 26th July, 2010, the

defendant no. 6/Customs Department was proceeded ex parte. Defendant No. 6 has not appeared thereafter.

19. The plaintiff has led the evidence of Captain Yogesh Puri, PW-1. He has exhibited in all eight documents. The defendant nos. 1 to 4 have led the evidence of Mr. Satprakash Goyal, DW-1 (defendant No. 2). He has attached with his evidence nine documents which have been marked as Mark D-1 to D-9 respectively. In admission/denial, 8 documents of the plaintiff were admitted as Ex. P-1 to P-8.

20. A perusal of the past orders show that parties have been taking several adjournments. On 16th July, 2004, the Court noted that before the Joint Registrar, the plaintiff was not taking requisite steps for prosecution of the suit. The suit was therefore dismissed in default. The suit was restored on 17th March, 2005. Several dates were taken for admission/denial of documents. Admission/denial was completed in 2006. Thereafter, the parties have again started taking adjournments on the ground that the contentions raised in the present suit would stand concluded in a pending adjudication of a writ petition filed by defendant nos. 1 to 4.

21. Issues were finally framed on 26th July, 2010. Several dates were taken by the parties for completing evidence. When the Hon''ble Supreme Court passed order dated 26th November, 2014 for disposal of the suit within three months, then the evidence of PW-1 on behalf of the plaintiff was not complete. The Joint Registrar on 27th November, 2014 noted that though the issues were framed on 26th July, 2010, the plaintiff has been taking dates on few previous hearings. Thereafter, the evidence of PW-1 was completed on 15th December, 2014; 16th December; 19th December; and 6th January, 2015. An opportunity was given on 6th January, 2015 to the defendants to file their affidavit by way of evidence. The cross-examination of DW-1 took place on 4th February, 2015 and 5th February, 2015. The matter was placed before the Court for hearing on 11th February, 2015.

22. The limited arguments advanced by the counsel for the plaintiff and defendant nos. 1 to 4 were heard on 19th February, 2015 and on 24th February, 2015. Parties filed their written submissions. The judgment was reserved on 24.02.2015.

23. At this stage, I may refer to another aspect. A question was posed to learned counsel for the parties as to what is the nature of the proceedings which have led to the Special Leave Petition having been filed before the Supreme Court where order dated 26.11.2014 has been passed. None of the counsel for the parties were able to explain the issue before the Hon''ble Supreme Court. Needless to add, the pleadings of the parties and the written submissions are silent about the same. From a perusal of the order of the Hon''ble Supreme Court passed in SLP No. 18364-18365/2012, it transpires that the said SLP arose out of a judgment and order dated 22.2.2012 passed in W.P. (C) 17976-17977/2004. I requested

the Registry to send the file of WP(C) No. 17976-17977/2004. A perusal of the writ petition shows that it was filed by defendant No. 1 seeking directions to Shipping Corporation of India Limited and Container Corporation of India Limited to deliver the goods in question pursuant to the three bills of entry without payment of any detention or demurrage charges. The matter was disposed of by the Division Bench vide judgment dated 23.2.2012. No relief was granted to defendant No. 1. Certain findings have been recorded by the Division Bench in the said judgment. The Division Bench had, however clarified that the present suit will be decided after recording of the oral evidence and examining the same and dismissal of the writ petition will not adversely affect the contention or defence taken by the defendant No. 1 herein or other parties in the present suit.

24. The learned counsels for the parties have made very limited submissions on merits in the course of final arguments. Essentially they have relied upon their written submissions.

25. I will first deal with issue No. 1 which reads as under:-

(i) Whether the plaintiff is entitled to recover Rs. 83,29,000/- from defendants No. 1 to 5? If so, at what rate of interest? OPP

26. In the written submissions filed the plaintiff has reiterated the contentions of the plaint. It is reiterated that defendants No. 1 to 5 are liable to pay the detention charges for the containers under the two different bills of lading dated 28.12.1990 and 31.12.1990. It is stated that the containers in which the goods were imported were hired by the plaintiff from Container Corporation of India to whom it is liable for payment of detention charges. The consignment under Bill of Lading dated 28.12.1990 arrived on 21/25.2.1991. The consignment under Bill of Lading dated 31.12.1990 arrived on 10.03.1991. Defendants No. 1 to 5 were to pay the freight and other charges and were required to obtain delivery order and take delivery of consignment from the containers within five working days on arrival of the containers. As the same was not done it is urged that the said defendants became liable to pay detention charges for the containers as per IPBC Tariff 1991 as amended in 1995. It is stated that disputes arose between defendants No. 1 to 5 and the Customs Department/defendant No. 6. Defendant No. 6 finally issued the Detention Certificate on 8.6.1993. However, the plaintiff required defendants No. 1 to 5 to pay the container detention charges. It is urged that as detention charges were not paid the plaintiffs had a lien and powers to retain the goods under section 170 and 171 of the Indian Contract Act, 1872 till the dues are paid. The issuance of the certificate of detention by the Customs Authority could not compel the plaintiffs being the shipper not to charge the detention charges. Reliance is placed on the judgments of the Supreme Court in Shipping Corpn of India Ltd. Vs. C.L. Jain Woolen Mills and Others, and International Airports Authority of India and Ors vs. Grand Slam International and Ors., (supra).

27. The defendants No. 1 to 4 have in their written submissions pointed out that

the value of goods is around Rs. 14 lacs only. Out of this, 30% of the goods have been damaged due to natural calamities and 30% of the cargo has been stolen on account of which defendants No. 1 to 5 have lodged an FIR.

28. Reliance is placed on Clause 18 of the Bill of Lading which states that if the goods are not delivered within 48 hours on its arrival, the carrier may unpack the container and free the same. It is urged that in the present case despite a long legal battle the plaintiffs have failed to do the needful. It is urged that as the plaintiff having failed to do the needful, their case is barred by limitation.

29. It is further stated that defendants No. 2 to 5 are also partners in one firm namely Sanjeev Woolen Mills which had also imported goods of identical description contemporaneously and at the same time as the goods were imported by the defendants No. 1 to 5 herein. In that case of Sanjeev Woolen Mills the Division Bench of this Court had held that there are serious allegations of malafide on the part of the Customs Department and on account of the same the Division Bench directed that the demurrage charges would be borne by the Customs Department. This judgment was upheld by the Supreme Court in the case of Union of India and Ors. vs. Sanjeev Woolen Mills (supra). Reliance is placed on the said judgment contending that the facts in that case of Union of India and Ors. vs. Sanjeev Woolen Mills (supra) and the present case are absolutely identical and that in view thereof the liability if any is that of defendant No. 6/the Customs Department and not of defendants No. 1 to 5.

30. It is further urged that in a writ petition filed by defendants No. 1 to 5 being CW 3277/1992 on 5.2.1993 the defendant No. 6 had in the said proceedings before this High Court stated that an appeal titled Union of India and Ors. vs. Sanjeev Woolen Mills (supra) is pending before CEGAT whose decision is awaited by the respondent No. 6 so as to apply the same to the case of the petitioner therein (i.e. defendants No. 1 to 5 herein). A direction was passed by this Court to CEGAT to decide the appeal with expedition and not later than three months. Relying on this submission of defendant No. 6 before the Writ Court, it is urged that the directions of Union of India and Ors. vs. Sanjeev Woolen Mills (supra) of this Court and the Supreme Court will be squarely applicable to the present case also. It is further urged that in this case also there was an attempt to twist the arm of the defendant to extract illegal money as in the case of Union of India and Ors. vs. Sanjeev Woolen Mills (supra). The disciplinary proceedings have been commenced against the concerned officer in Sanjeev Woolen Mills and the same officer was responsible for delaying the release of the goods of the defendant herein.

31. Reliance is also placed on judgments of this High Court in the case of Om Petro Chemicals Vs. Union of India and Others, and Sonia Overseas (P) Ltd. Vs. Asst. Commr., Customs, to contend that the liability if any is of defendant No. 6.

32. The facts which are sought to be relied upon by the plaintiff are not really disputed by defendants No. 1 to 4. The bill of lading in question is dated

28.12.1990 and 31.12.1990. The consignments have arrived on 21 to 25.2.1991 and on 10.3.1991 respectively. The defendant No. 6 issued a detention certificate on 8.6.1993. Hence, the defendants were thereafter free to get the goods released. However, detention charges were not paid and hence the delivery order was not revalidated. The goods are still with the plaintiff and have continued to lie in the custody of the plaintiffs despite lapse of almost 24 years. There is no dispute about the applicability of the IPBC Tariff. Defendants No. 1 to 4 never paid the detention charges and kept contending that it is at best the liability of defendant No. 6. The plaintiff kept asking for its dues, but never took any other step.

33. I may clarify here that a perusal of the plaint shows that the only issue here is recovery of detention charges. There are no submissions made regarding any demurrage or storage charges payable. In fact a question was posed to the learned counsel for the parties as to apart from detention charges if any demurrage or storage charges for the goods would arise. None of the counsel had any answer.

34. The defence of defendant No. 1 to 4, however, centres around two facts/contentions. Firstly, it is stated that the facts of the present case are exactly akin to the case of Union of India and Ors. vs. Sanjeev Woolen Mills (supra) in which defendants No. 1 to 5 are also partners. Goods of the same description were involved in the said case of Sanjeev Woolen Mills (supra). The products were imported contemporaneously. The same officer was responsible for holding up the goods illegally and malafidely in the case of defendants No. 1 to 5 and in the case of Sanjeev Woolen Mills. The Division Bench of this Court directed the Customs Authority in case of Sanjeev Woolen Mills (supra) to bear the demurrage charges which direction was upheld by the Supreme Court in Union of India and Ors. vs. Sanjeev Woolen Mills (supra). The second argument is relying on Clause 18 of the Bill of Lading and the general principles of lien that there can be no justifiable reason for the plaintiffs not to have mitigated their losses and to empty out the containers as provided in the Bill of Lading.

35. I will first deal with the submission of the defendants regarding clause 18 of the Bill of Lading. The general principle centres around section 73 of the Indian Contract Act. The explanation to section 73 reads as follows:-

Explanation-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

36. The goods arrived on 21 to 25.2.1991 and 10.3.1991. The customs department issued the detention certificate on 8.6.1993 and 29.5.1993. From 8.6.1993 till the year 2000 when the present suit was filed the defendants kept asking for reduction of detention charges or that the payment be collected from defendant No. 6 while the plaintiff kept insisting that it had a lien on the goods and would not issue the delivery order till necessary detention charges were paid.

37. Even after having filed a suit, despite lapse of another 15 years nothing has been done by the plaintiffs and the goods are lying exactly where they were. Plaintiff never sought interim directions from this court to sell/deal with the goods lying in the containers. The condition of the goods as of now is not known. As per the defendants, when they filed the written statement they stated that 30% of the goods have been damaged due to natural calamities and 30% of the cargo has been stolen for which an FIR has been got registered. It is unlikely that the cargo would be of much worth today.

38. What is the effect of the conduct of the plaintiff? The value of the goods was around 14 lacs when they were imported. According to the plaintiff total dues which have accrued upto 10.03.2000 as per the IPBC tariff is Rs. 10.27 crores. No break up or calculation of the claim is filed. From a very confused para 34 of the plaint it appears that presuming that substantial portion of the claim is time barred, the plaintiffs have only sought charges prior to three years of filing of the suit amounting to Rs. 83,29,000/-. Hence, for a cargo worth Rs. 14 lacs they seek to recover Rs. 83,29,000/-.

39. Reference may be had to a Division Bench judgment of this High Court in the case of New Rama Seed Corporation vs. Darshan Lal Jain in RFA 374/2001 decided on 29.09.2008. The facts of that case were that the appellant had placed an order on the respondent for manufacture and supply of certain type of tin boxes. There was a default in lifting some of the tin boxes ordered on account of certain disputes. The following observations were made in the context of the award of damages for storage of the goods in the godown for a certain period after the order had been cancelled by the appellants.

40. This Court held as follows:-

18. Under the proviso to Section 73 of the Contract Act it is the duty of every party to a contract to mitigate the loss if there is a breach of contract.

19. The appellant had refused to lift the boxes in the year 1997 itself and thus we see no reason why the respondent continued to hold on to the boxes which were not being accepted by the appellant. Further, since the respondent was not paying any rent for the godown in question and there being no evidence that the respondent could not store other goods in the godown due to lack of space, we hold that no case is made out to award damages towards storage charges.

41. In the present case, despite lapse of considerable time, defendants No. 1 to 5 were neither lifting the goods nor paying the detention charges. This conduct of defendants No. 1 to 5 was a clear pointer to the plaintiff that the defendants No. 1 to 5 had more or less abandoned the goods. There can be no reason or explanation as to why the plaintiffs have continued to keep waiting and did not take steps to mitigate their damages.

42. I may refer to the Bill of Lading. Clause 18 of the Bill of Lading reads as follows:-

18. Delivery of goods in containers-

If receipt of Goods in containers is not taken by the Merchant within 48 hours after discharge from the vessel (or after the arrival of the Goods at the place of delivery if named herein) the Carrier shall be at liberty at his discretion either to unpack the container(s) and to put the goods in safe custody on behalf of the Merchant and at the Merchant's risk and expense or to charge demurrage in accordance with the carrier's tariff applicable to the route over which the Goods are carried. If unpacking the contents of Container is required for whatever reason and the contents cannot be identified as to remarks and numbers, cargo sweepings, liquid residue and any unclaimed contents not otherwise accounted for shall be allocated for completing delivery to the Merchant. The Carrier shall not be required to separate or deliver goods in accordance with brand, marks, numbers, size or types of packages as stated by the Merchant in his particulars but only to deliver total number of container(s) (If same loaded by the Merchant, or packages or Units (if containers) loaded by the Carrier) shown on the face of this Bill of Lading.

43. The above clause clearly provides that if within 48 hours the goods are not taken out of the container the plaintiffs can remove the goods from the container and free the container.

44. The above facts have to be seen in the light of the rights of the plaintiff. Sections 170 and 171 of the Indian Contract Act, 1872 reads as follows:-

170. Bailee's particular lien-

Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed he has in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

171. General lien of bankers, factors, wharfingers, attorneys and policy brokers-

Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other person have a right to retain, as a security for which balance, goods, bailed to them, unless there is an express contract to that effect.

There is no serious dispute between the parties that the plaintiff would have a lien on the goods for recovery of the detention charges. However, a lien does not give right to the bailee to sell the goods. In this regard reference may be had to the judgment of the Supreme Court in the case of *The Board of Trustees of The Port of Bombay and Others Vs. M/s Sriyanesh Knitters*, where in paragraph 18 the Supreme Court held as follows:-

18. There is another aspect which is relevant. Section 171 of the Contract Act

only enables the retention of goods as security. On the other hand in respect of current dues in respect of existing goods in their possession the Board not only has a lien under Section 59 of the MPT Act but it also has the power to sell the said goods and realise its dues by virtue of Section 61 of the MPT Act. The procedure for exercising this power of sale of the goods in respect of which the Board has lien is contained in the said section. Before selling the goods no order of any court or other judicial authority is required. On the other hand the general lien contemplated by Section 171 of the Contract Act only enables the retention of the bailed goods as a security. Their retention does not give any power to sell the goods, unlike the power contained in Section 61 of the MPT Act. If payment is not made by the consignee to the wharfinger, in a case where Section 171 of the Contract Act applies, the wharfinger can only retain the goods bailed as security and will have to take recourse to other proceedings in accordance with law for securing an order which would then enable the goods to be sold for realisation of the amounts due to it. It may in this connection, be necessary for the wharfinger to file a suit for the recovery of the amount due to it and Section 131 of the MPT Act clearly provides that such a remedy of filing a suit is available to the Board. The added advantage of sale given by Section 61 of MPT Act in respect of current dues cannot be regarded as whittling down the right of general lien contained in Section 171 of Contract Act in respect of old dues.

45. Hence, the right of lien provided under sections 170 and 171 of the Contract Act enables the plaintiff to detain goods as security. He has, however, no right to sell the goods and realise its dues. He has to file a suit for recovery of the amount due and take orders from the Court for sale of goods.

46. The facts show that after 1993 when the Detention Certificate was issued, there was no impediment to release of the goods to defendants No. 1 to 5 other than the detention charges. The tariff relied upon by the plaintiff prescribes no period upto when the plaintiff can keep charging under the tariff.

47. Needless to add where no time is prescribed the plaintiff would have to act within a reasonable time. The Supreme Court in *Veerayee Ammal Vs. Seeni Ammal*, held as follows:-

12. When, concededly, the time was not the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A constitution Bench of this Hon'ble Court in *Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.*, held that in case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case.

13. In *S. Vidyandam and Ors. v. Vairavan* 1997(3) SCC this Court held:

Even where time is not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.

14. The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means as soon as circumstances permit. In Law Lexicon it is defined to mean "A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly"; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.

48. In *Firm Bachhraj Amolakchand and Another Vs. Firm Nandlal Sitaram and Others*, ; a Division Bench of Madhya Pradesh High Court held as follows:-

...In the absence of there being any agreement with regard to the time within which the contract was to be performed, the provisions of the Contract Act require that the contract has to be performed within a reasonable time. What is "reasonable time" is a question of fact depending upon the particular circumstances of each case.

49. Hence, the plaintiff was obliged to take steps within a reasonable time to realise its dues press for necessary orders and to thereafter dispose of the goods of defendants No. 1 to 5. This step by the plaintiff would lead to twin results. Firstly, the deterioration of the goods/loss of goods due to passage of time would be prevented. Secondly, orders of the Court could be requested for disposal of the goods so as to ensure that the detention charges stop running. The proceed of any such disposal/sale could be utilised to pay in part the dues of the plaintiff.

50. The facts are that from June 1993 the only impediment for release of goods to defendants 1 to 5 was the pending detention charges. For whatever reasons the defendants 1 to 5 did not pay up the said charges. They kept insisting that it is the liability of defendant No. 6. In its reply to the legal notice sent by the plaintiff dated 1.3.1999 (Ex. PW1/8), Defendant No. 1 has pointed out that it has written several letters to the plaintiff including letters dated 29.4.1991, 29.5.1993, 14.4.1997, 14.7.1997 etc. asking for remission of the detention

charges and release of the goods. These communications have not been proved in evidence. However, it is clear that from 1993 till filing of the suit, the defendants 1 to 4 were not interested to pay the detention charges. The lapse of time itself would have been an indication of this stand of defendants 1 to 4. Delay beyond reasonable time which is abnormal frustrates the contract. In my opinion, after waiting for one or at best two years after the issue of detention certificate by the Customs in June 1993, the plaintiff was obliged to empty its containers and take steps to mitigate its damages/dues. In terms of the said clause 18 of the Bill of Lading read with section 73 of the Contract Act, the plaintiffs were under an obligation to clear their container/storage space within a reasonable time. They were entitled to detention charges upto at best 1995. There is no explanation for an abnormal delay of about five years to approach the court. The claim for detention charges for the period March 1997 to March 2000, as is sought in the plaint is not sustainable and cannot be claimed.

51. Coming to the second leg of the submission of defendants No. 1 to 4, parities with the case of Sanjeev Woolen Mills, we may have a look at the facts of the case of Sanjeev Woolen Mills. That was a case where four bills of entry were of January 1991 to March 1991. The bills of entry were in respect of synthetic waste (soft quality) imported by the respondent. Sanjeev Woolen Mills in that case sought release of the goods free of duty in terms of valid import/export passbook. The customs claimed that on testing, the goods were found to be of prime fibre and not soft waste.

Defendants No. 1 to 4 alongwith the written statement have filed a copy of the Show Cause notice issued on 23.6.1993 by the Assistant Collector of Customs in the present case. Though this document has not been proved, it is not a disputed document and I can refer it for culling out the facts of the present case regarding the dispute with defendant No. 6. As per the Show Cause Notice the bills of entry in the present case were for clearance of goods for synthetic waste/soft quality. As per the test report, it is stated that in the Show Cause that the sample tested found that there is no existence/percentage of waste as defined earlier. The bills of entry are also of February to April 1991.

The facts of the present case are more or less identical with the facts of the case in which judgments were passed by this High Court and the Supreme Court in the case of Sanjeev Woolen Mills.

52. In para 18 the Supreme Court in Union of India and Ors. vs. Sanjeev Woolen Mills (supra) held as under:-

18. Looking to the totality of circumstances pertaining to the import of the consignments under the four Bills of Entry and the inordinate delay of about six years for their release, the High Court has passed the impugned orders directing the appellants to issue a detention certificate and bear the demurrage and container detention charges. They are obviously orders passed in the special circumstances of the present case, and particularly the conduct of the Customs

authority in not releasing the goods even after the order of unconditional release dated 11.8.1995 passed by their own Chief Commissioner. The conduct of the Customs officers concerned is also under investigation. We do not think that this is a case where any intervention at our hands is required. The apprehension of the appellants that this will constitute a precedent is not justified because it is clearly an order which is meant to do justice to the respondent looking to the totality of circumstances and the conduct of the appellants. Obviously, for any delay on the part of the respondent in taking delivery of the goods after 5.4.1997, the respondent will have to bear the consequences. For the period prior to 5.4.1997, however, the order of the High Court does not require any intervention from us. The appellants shall file a progress report relating to the departmental inquiry by 30th November, 1998.

53. I may also look at the judgment relied upon by the plaintiff in the case of Shipping Corporation of India Ltd. vs. C.L. Jain Woollen Mills and Ors. (supra). The facts of the case were that on 18.01.1999 the Division Bench of this High Court called upon the Customs Department and the two corporations including the Shipping Corporation of India to sort out the matter within a specified period and further held that if the detention or demurrage charges are payable the same shall be paid by the Customs Department within three weeks. The said direction was upheld by the Supreme Court. The Supreme Court further reiterated that the judgment of the Supreme Court in Union of India and Ors. vs. Sanjeev Woollen Mills (supra) was justified in the facts and circumstances of that case. The Supreme Court in paragraph 8 held as follows:-

8..... In the contextual facts, notwithstanding the judgment of the High Court, the goods not having been released, the impugned order and direction dated 18.1.99, cannot be held to be infirm in any manner. In the absence of any provision in the Customs Act, entitling the customs officer to prohibit the owner of the space, where the imported goods have been stored from levying the demurrage charges, levy of demurrage charges for non-release of the goods is in accordance with the terms and conditions of the contract and as such would be a valid levy. The conclusion of the High Court to the effect that the detention of the goods by the customs authorities was illegal and such illegal detention prevented the importer from releasing the goods, the customs authorities would be bound to bear the demurrage charges in the absence of any provision in the Customs Act, absolving the customs authorities from that liability. Section 45(2)(b) of the Customs Act cannot be construed to have clothed the customs authorities with the necessary powers, so as to absolve them of the liability of paying the demurrage charges. In the aforesaid premises, we see no infirmity with the directions given by the Delhi High Court on 18.1.99. The goods in question, having already been directed to be released, without the payment of the demurrage charges, the importer must have got the goods released. Having regard to the fact situation of the present case, it would be meet and proper for us to direct the Shipping Corporation and Container Corporation, if an application is filed by the customs authorities to waive the demurrage charges. The appeal is

disposed of accordingly.

54. Reference may also be had to two other judgments relied upon by the defendants i.e. *Om Petro Chemicals vs. Union of India and Ors.* (supra) and *Sonia Overseas (P) Ltd. vs. Asst. Commr., Customs.*

55. In *Om Petro Chemicals vs. Union of India and Ors.* (supra) this Court relying upon the judgments of the Supreme Court in *Union of India and Ors. vs. Sanjeev Woolen Mills* (supra) and *Shipping Corporation of India vs. C.L. Jain Woolen Mills and Ors.* (supra) held as follows:-

23. Would that however mean that the petitioner must pay demurrage charges even though it is not at fault. Answer to the question must be rendered in negative. The decisions of the Apex Court Therefore are authorities for the proposition in certain situation, the court may direct the customs authorities to bear the demurrage charges. In the instant case the customs authorities still insisted that the goods were illegally imported. It sought to justify its stand even before this Court. This Court is not only a court of law but also a court of equity. In a situation of this nature we are of the opinion that this court may find that in place of the importer or the consignee, the customs authorities should bear the charges. Once it is held that the petitioner herein has not committed any illegality in importing the goods in question, in our opinion, it cannot ordinarily be saddled with the liability of payment of demurrage. The petitioner in the fact situation of this case must be held to have been sinned against than sinning. In *Union of India and Others Vs. M/s. Sanjeev Woollen Mills*, the Apex Court in the fact situation obtaining therein held that demurrage may not be paid by the importer.

56. Similarly, in *Sonia Overseas (P) Ltd. vs. Asst. Commr., Customs* (supra) a Division Bench of this High Court relying upon *Union of India and Ors. vs. Sanjeev Woolen Mills* (supra), *International Airports Authority of India and Ors vs. Grand Slam International and Ors.* (supra) and *Om Petro Chemicals vs. Union of India and Ors.* (supra) held that the burden is on the petitioner to produce sufficient material to suggest malafides of the authorities concerned. It is a heavy burden which can be discharged ordinarily by initiating civil proceedings. Unless malafides are established, liability on the customs cannot be established.

57. The question is: Are the malafides established in the present case? In *Union of India and Ors. vs. Sanjeev Woolen Mills* (supra) the Supreme Court had noted that the conduct of the Customs Officers concerned is under investigation. In fact the customs was directed to file a progress report regarding a departmental enquiry in the said case.

58. In the present case also in the written statement itself defendants No. 1 to 4 have stated that the goods of the defendants were detained illegally as there was a demand of Rs. 50 lacs made by one of the Customs Department official for release of the goods. DW-1 in his evidence by way of affidavit has clearly pointed out the name of the official namely Mahesh Kumar Badha. It is stated that the

said official has been chargesheeted for his conduct relating to the goods of Sanjeev Woolen Mills. His chargesheet has been filed alongwith affidavit though it has not been proved and has been given a mark as D-7. The said document has not been contested by the plaintiffs. It is an article of charge framed against Mahesh Kumar Badha the then Collector of Customs who was operating as Collector of Customs from January 1991 to January 1992. The allegation pertains to his conduct regarding Sanjeev Woolen Mills, namely, not allowing clearance of waste/woollen waste imported by the firm.

59. DW-1 Sh. Sat Prakash Goyal, Defendant No. 2 in his affidavit by way of evidence on bribery has stated as follows:-

22. CBI enquiry was conducted and Mr. Mahesh Kumar Bhada was charge sheeted. Copy Annexed Marked Exhibit-D7. It is relevant to mention that goods were taken only on the production of detention certificate, which were not given by the customs for the reason that defendant no. 6 for ulterior motive and malafide reasons detained the goods not only on the wrong suspicion that goods were not of the same nature as described but for want of illegal bribe. Goods of same description in Sanjeev Woolen Mills were also detained by the defendant no. 6. It is relevant to mention here that show cause notice were issued after lapse of more than an year and there was no delay on part of the defendant no. 1 to 5. In the meanwhile defendant no. 1 firm made several representation for release of goods but no heed was paid to the said representation and even to representation to the ministry of Finance.

.....

24. That the goods detained of M/s. Monica India were never released by the custom department. However goods which were detained due to ulterior motive and malafide reasons were synthetic waste only as declared by defendant no. 1. This was proved by the reports of the best laboratories which are preferred even by custom department, Bombay except their own Lab called Central Revenue Control Laboratory (CRCL), Pusa Road, New Delhi, under the control of Chief Chemist and now-a-days Director. The then chief chemist Dr. Badri Prasad was known corrupt and was managing to give report as required by Custom Officers and in exceptional cases, where he was getting heavy illegal money, in favour of importer. The undersigned, defendant no. 2, have filed criminal complaint dt. 20-09-2014 filed on 29-09-2014 in Ludhiana District Courts against the CRCL and custom officers, copy annexed marked Exhibit-D8. May this Hon"ble court be pleased to direct the lower court to expedite and decide the same within 3 months as it is based on all documentary evidences taken under RTI Act, 2005 to curb malpractices in CRCL, New Delhi.

60. DW-1 in his cross-examination has reiterated that it is on account of fault of defendant Mahesh Kumar Badha the then Collector of Customs/ICD who had demanded bribe from the defendant that the goods were detained prior to 30.6.1993. He was also asked as to whether there is any difference between the

facts of the case of Sanjeev Woolen Mills and the present case. He has denied any difference.

61. Relevant portion of his cross-examination reads as follows:-

It is incorrect to suggest that the goods were detained prior 30.06.1993 on account of fault of the defendant. Sh. M.K. Bhada was the person concern, the then Collector of Custom ICD, New Delhi who had demanded the bribery from the defendant.

Q. Would you be able to say as to whether there is any difference in between the facts of Sanjeev Woolen Mills Case and the present case?

A. No.

62. In the light of the above categorical averments, and the evidence of DW-1 it is clear that defendants No. 1 to 4 have established malafides on the part of defendant No. 6. However, defendants No. 1 to 4 have filed no counter claim. In view of the judgment of the Division Bench of this High Court in the case of CWP 17976-77/2004, no liability can be thrust on defendant No. 6.

63. Defendant No. 5 is not appearing and has been proceeded ex parte. The admitted position is that when the transaction took place in 1991 he was a partner of defendant No. 1. He has exited sometime in 1993. If there is no liability of defendants No. 1 to 4 no liability can also fall on defendant No. 5.

64. I have already held that the plaintiffs are not entitled to claim detention charges on account of clause 18 of the Bill of Lading and the explanation to section 73 of the Contract Act for the period claimed in the suit i.e. March 1997 to March 2000. The issue No. 1 is answered accordingly.

65. I will now deal with issue no 2 which reads as follows:-

2. Whether the present suit is barred by Section 155 of the Customs Act? OPP

66. Section 155 of the Customs Act, 1962 reads as follows:-

155. Protection of action taken under the Act.--

(1) No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Government or a local authority for anything which is done, or intended to be done in good faith, in pursuance of this Act or the rules or regulations.

(2) No proceeding other than a suit shall be commenced against the Central Government or any officer of the Government or a local authority for anything purporting to be done in pursuance of this Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the cause thereof, or after the expiration of three months from the accrual of such cause.

67. Hence, no suit etc. lies for any act done by the Central Government in good faith. Similarly, no suit can be commenced for anything done in good faith without giving the Central Government a month's previous notice in writing.

68. This suit is filed by Shipping Corporation of India primarily seeking its dues from defendants No. 1 to 5. An alternate prayer is sought that if for any reason this court feels that defendants No. 6 is liable, a decree be passed against defendant No. 6. I have already held that in view of the judgment of the Division Bench in CWP 17979-77/2004, there is no liability on defendant No. 6. The present issue would not really survive.

69. In any case, as I have already held that the goods were illegally detained for mala fide. If some liability was to be thrust on defendant No. 6 on account of the said mala fide act, it could not be said that the suit is barred under Section 155 of the Customs Act.

70. The Division Bench of this Court in *Sonia Overseas (P) Ltd. vs. Asst. Commr. Customs*, (supra) held as follows:-

7. As regards the immunity granted by the statute, it will be noted that Section 155 of the Customs Act seeks to protect the actions of the local authority from any legal prosecution or proceedings in following words:-.....

Thus, no liability, civil or criminal, may be attracted so long as the power that has been exercised by the Customs Authority is in good faith and not in colourable exercise of power. Explaining the concept of exercise of power in good faith their *Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others*, held thus:-

18. The expression "good faith" has not been defined in the Ceiling Act. The expression has several shades of meaning. In the popular sense, the phrase "in good faith" simply means "honestly, without fraud, collusion, or deceit; really, actually, without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme", (see *Words and Phrases*, Permanent Edn., Vol. 18-A, p.91). Although the meaning of "good faith" may vary in the context of different statutes, subjects and situations, honest intent free from taint of fraud or fraudulent design, is a constant element of its connotation. Even so, the quality and quantity of the honesty requisite for constituting "good faith" is conditioned by the context and object of the statute in which this term is employed. It is a cardinal canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context.

8. The Supreme Court in *Assistant Commissioner, Anti Evasion Commercial Taxes, Bharatpur Vs. Amtek India Limited*, also observed thus:-

9. Whether an act has been done in good faith would depend upon the factual scenario. In order to establish "good faith", it has to be established that what has been imputed concerning the person claiming it to be so, is true.

10. "Good faith" according to the definition in Section 3(22) of the General Clauses Act, 1897 means a thing, which is in fact done honestly whether it is done negligently or not.

11. Anything done with due care and attention, which is not mala fide is presumed to have been done in "good faith".

12. "Good faith" is defined under Section 2(h) of the Limitation Act, as "good faith"-nothing shall be deemed to be done in good faith which is not done with due care and attention.

Hence the suit is maintainable. Issue No. 2 is answered accordingly.

71. The issue no. 4 reads as under:-

4. Whether there is no privity between the plaintiff and defendants no. 1 to 4? OPD-1 to 4

72. The onus regarding this issue was on defendant nos. 1 to 4. No submission has been made by defendant nos. 1 to 4 in regard this issue. Hence, I hold that there is privity of contract between the plaintiff and defendant nos. 1 to 4.

73. The issue no. 3 reads as under:-

3. Whether this suit is barred by time? OPD-1 to 4

74. The onus to prove this issue was on defendants No. 1 to 4. In the written submissions filed no submissions have been made to support this contention. In the present suit the plaintiffs claimed detention charges of only three years prior to filing of the suit. Hence, I hold that the suit is not barred by time.

75. In view of my finding on issue no. 1 above, the present suit is dismissed with costs.

76. I may add that the goods are still lying in a container with the plaintiff. The plaintiffs are free to take steps to destuff the container and dispose of the goods of defendant No. 1 in the best possible manner. As value of the goods would have considerably reduced, no need is felt to appoint a court auctioneer. As defendants No. 1 to 5 have abandoned the goods, the plaintiff would be entitled to retain the sale proceeds from sale of such goods.