

(2005) 09 CAL CK 0003

In the Calcutta High Court

Case No : G.A. No. 4265 of 2004, APOT No. 705 of 2004 and WP No. 1893 of 2004

Surajmal Baijnath Indus. P. Ltd.

APPELLANT

Vs

Pasupati Agro Chem Nepal P. Ltd.

RESPONDENT

Date of Decision : 01-09-2005

Acts Referred:

Customs Act, 1962 — Section 48

Major Port Trusts Act, 1963 — Section 53, 53(1), 61, 61(1), 61(2)

Sales of Goods Act, 1930 — Section 2(14), 20, 64, 64(3), 64(4)

Citation : (2006) 1 CALLT 328 : (2005) 190 ELT 161

Hon'ble Judges : Maharaj Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Aninda Kumar Mitra, Ratnako Banerjee and Sakya Sen, for the Appellant; Rajat Kumar Ghosh S.K. Roy Chowdhury, Sudhir Kumar Mehata, A.K. Jena and Malay Singh, for the Respondent

Final Decision : Allowed

Judgement

Dilip Kumar Seth, J.

The questions :

1. In this appeal in course of hearing three points emerged. The first point that emerged was whether the absence of individual notice to the owner of the goods in terms of Section 61(3) of the Major Port Trust Act, 1963 would affect the validity of the auction sale and passing of title to the goods to the auction purchaser. The second point that cropped up was whether the Port Trust could take steps for sale of the goods by auction in terms of Section 61 during the pendency of the application for waiver of demurrage charges made by the importer u/s 53 of the Major Port Trust Act, 1963. The main argument was advanced on these two points, either in support or against the setting aside of the auction sale. The third point that emerged, in course of hearing the appeal, was with regard to the compliance of Section 61(2) affecting the validity of the

auction itself.

Facts :

2. Before we attempt to answer the points raised we may briefly refer to the facts. In August 2001, the writ petitioner/respondent Pashupati Agrochem Nepal (P) Ltd. (PANPL) imported three consignments of copper scraps in six containers through Haldia Dock Complex of the Kolkata Port Trust (KoPT). The said consignments were in transit through the port of Haldia to Nepal. The writ petitioner/importer had appointed clearing agent M/s. Kapur & Company to clear the goods. The writ petitioner/importer alleged that by reason of the dispute between the writ petitioner and its clearing agent, goods could not be cleared and were lying with the Port Trust authorities. The clearing agent wrote a letter on 14th August, 2002 (Page 69 of the paper book) that the consignment could not be cleared because of non payment of detention charges and port demurrage charges by the writ petitioner/importer. The importer was fully aware that the goods were lying with the Port Trust Authority from August, 2001. It was well within the importer's/clearing agent's knowledge that the uncleared goods are liable to be sold by the Port Trust Authorities u/s 61 of the Act. The importer made the first waiver application on 11th February 2004 (pages 64 and 65 of the paper book). This was addressed to the Chairman not to the Board of the KoPT. In the said waiver application the importer admitted the demurrage and detention charges of Rs. 1.5 crore to be outstanding to KoPT. This application was held by the KoPT to be incomplete and therefore was not considered (page 164 and 165 of the paper book). The second waiver application was made by the importer on 9th March, 2004 (page 66 of the paper book). In this application the importer enclosed a chart showing details of the demurrage charges (page 104). The application was considered by the KoPT and was rejected; and this rejection was conveyed to the importer (page 87 of the paper book). In its third waiver application made on 19th March, 2004 the importer offered Rs. 25 lacs against the admitted demurrage charges of Rs. 145 lacs. According to the KoPT, this application was not maintainable, (page 166 of the paper book).

2.1 On the other hand in or about August, 2003 since the writ petitioner did not approach the authorities of KoPT for clearance of the said consignments and since no delivery challans and/or documents were filed with the KoPT on behalf of the writ petitioner, the said consignments were put up for sale for the first time after issuing advertisement in the newspapers and after publication in the Calcutta Gazette. However the goods were withdrawn from sale as the price offered was not adequate. On September 25, 2003 a second advertisement was published in the Statesman, Kolkata inviting tenders in connection with the sale of the consignment intimating that further details can be obtained from the office of the KoPT. On October 22, 2003 this advertisement was again published in the Statesman, Kolkata and the Pratidin inviting tenders in respect of the consignment informing that the details and the description of the goods could be obtained from the office of the KoPT. In November, 2003 this second attempt to

sell the consignments also became infructuous as the price offered was very low.

2.2 In the meantime PANPL, the importer filed a civil suit no. 167 of 2003 in this Court in June, 2003 against its clearing agent M/s. Kapoor & Co. making KoPT proforma respondent No. 7 for compensation on the ground that the clearing agent did not arrange for clearing the goods. In the plaint the importer pointed out that due to huge demurrage charges the clearing of the goods had become uneconomical. In connection with the said money suit no interim order was passed in relation to the dealing with the goods by the KoPT.

2.3 In the circumstances the Board of the KoPT had put up the said consignments to sale u/s 61 of the Major Port Trust Act, 1963 after due publication of notification/notices etc. The consignments were sold by auction on 26th February, 2004. The auction sale was confirmed by the Board of the KoPT by its resolution No. 64, dated 12th March, 2004 approving the said auction sale.

2.4 On the ground that the third waiver application was not considered, the writ petitioner/respondent moved the writ petition on 29th March, 2004 viz: after the auction sale had taken place but before delivery could be taken by the appellants/ auction purchasers. In one case one of the appellants had deposited the full price and in other case the interim order was issued in the writ petition after the earnest money was deposited but before the full price could be paid by the other appellant. In the said writ petition a direction was given to the KoPT to consider the application for waiver. The KoPT in terms of the said order considered the said waiver application and passed an order which reads thus :

"Against this backdrop and particularly, keeping in view the friendly relations the Govt. of India have with Royal Govt. of Nepal, the Trustees after deliberation resolved to sanction the followings :-

(i) 80% of the consignment wise demurrage charges (i.e. basic demurrage charge + 10% Special Rate) accrued up to the date of delivery, may be waived subject to realization of demurrage charges at least equivalent to the respective CIF values of the three consignments, provided -

(a) PANPL (Pashupati Agrochem Nepal (P.) Ltd.) takes delivery of the cargo within 15 days from the date of communication of this order.

(b) PANPL prior to taking delivery of the cargo, submits "No Objection" (addressed to KoPT) from the purchasers, towards delivery of the cargo to PANPL on payment of interest to such purchasers, if so demanded, as proposed by M/s. PANPL during hearing the case by the Trustees on 16-8-2004.

In this case, after deposition of the required amount of demurrage charges by PANPL (after adjusting Rs. 40 lakh already deposited by them) and on receipt of the aforesaid "No Objection" from the purchasers but prior to effecting delivery of the cargo to the importer the sale of 3 lots to M/s. Soorajmal Baijnath Industries Pvt. Ltd. & M/s. Bharathi Rubber Lining & Allied Services Pvt. Ltd. approved by the Board of Trustees vide resolution No. 64, dated 12-3-2004,

would be cancelled under intimation to the aforesaid purchasers.

(ii) If the order at sub-para (i) above is complied with by PANPL, KoPT would refund the Earnest Money Deposit or Sale value to M/s. Soorajmal Baijnath Industries Pvt. Ltd. and M/s. Bharathi Rubber Lining & Allied Services Pvt. Ltd., as the case may be, without interest, within 15 days from the date of physical delivery of the three consignments.

(iii) In case the order in sub-para (i) above is not complied with by PANPL, KoPT would move the Hon"ble Court for vacating of the stay order passed by the Hon"ble Court on 29-3-2004. Upon vacation of the stay order, M/s. Soorajmal Baijnath Industries Pvt. Ltd. would be allowed to deposit the balance amount within 15 days from the date of communication of the vacation order failing which Earnest Money Deposit lying with KoPT, would be forfeited. Upon vacation of stay order and on receipt of full sale value the purchaser would be allowed to take delivery of the sold lots within a period of another 15 days failing which the Sale Value so deposited would be forfeited. Since, M/s. Bharathi Rubber Lining & Allied Services Pvt. Ltd. have already deposited the full sale value, they would be allowed to take delivery of their lot within a period of 15 days from the date of vacation of the stay order, failing which the sale value already lying with KoPT, would be forfeited.

On completion of delivery to the purchasers Rs. 40 lakh already deposited by PANPL, would be refunded to them without interest."

2.5 The learned Single Judge, ultimately, was pleased to allow the writ petition on 19th November, 2004 holding inter alia that the auction sale could not be held without notice to the importer and was pleased to set aside the auction sale and direct delivery of the goods on following terms :

"For the reasons mentioned hereinbefore, the goods in question could not have been put up for sale in auction and therefore, the steps taken by the Port trust authorities in this regard were totally unauthorized and illegal. Accordingly, the sale of the imported goods of the petitioner company by holding auction by the respondents Port Trust Authorities cannot be sustained and the same is therefore quashed.

In the aforesaid circumstances, the added respondents will have no claim over the aforesaid imported goods of the petitioner company.

The respondent Kolkata Port Trust authorities are directed to take immediate appropriate steps for delivery of the good in question to the petitioner company within 15 days from the date of communication of this order subject to payment of demurrage charges as mentioned in the order dated 23rd August, 2004 passed by the Board of Trustees for the Port of Kolkata and without demanding any no objection certificate from the aforesaid intending purchasers, namely, the added respondents herein. Needless to mention that if the petitioner company herein fails to take delivery of the goods in question in terms of this order within

the time mentioned herein-above, then the authorities of the Kolkata Port Trust will be at liberty to deal with the goods in question in terms of the aforesaid order dated 23rd August, 2004 passed by the Board of Trustees for the Port of Kolkata."

2.6 Thus, it is against this order the present appeal has since been preferred by the two auction purchaser/respondents.

Major Port Trust Act: Section 53 and Section 61:

3. In order to answer the question we may first refer to Section 53 and Section 61 of the Major Port Trust Act, 1963 relevant for our present purpose. Both Sections 53 and 61 are engrafted in Chapter VI dealing with imposition and recovery of rates at port. Section 53 empowers the Board "in special cases and for reasons to be recorded in writing exempt either wholly or partially any goods or vessels or class of goods or vessels from the payment of any rate or of any charge leviable in respect thereof according to any scale in force" under the 1963 Act "or remit the whole or any portion of such rate or charge so levied." Whereas Section 61 provides that "after the expiry of two months from the time when any goods have passed into its custody" the Board may "sell by public auction *** such goods or so much thereof as, in the opinion of the Board may be necessary -

(a) if any rates payable to the Board in respect of such goods have not been paid, or

(b) if any rent payable to the Board in respect of any place on or in which such goods have been stored has not been paid, or

(c) if any lien of any ship-owner for freight or other charges of which notice has been given has not been discharged and if the person claiming such lien for freight or other charge has made to the Board an application for such sale."

3.1 The procedure for such sale has been provided for in terms of subsections (2) and (3), which, so far relevant for the present purpose, read thus :

"(2) Before making such sale, the Board shall give ten days" notice of the same by publication thereof in the Port Gazette, or where there is no Port Gazette, in the Official Gazette and also in at least one of the principal local daily newspapers.

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(3) If the address of the owner of the goods has been stated on the manifest of the goods or in any of the documents which have come into the hands of the Board, or is otherwise known notice shall also be given to him by letter delivered at such address or sent by post, but the title of a bonafide purchaser of such goods shall not be invalidated by reason of the omission to send such notice, nor shall any such purchaser be bound to inquire whether such notice has been sent."

The Third Point:

4. In the backdrop of the facts and the law, the third point, as emerged in course of the hearing of the appeal, admittedly not argued before the Writ Court nor pleaded in the writ petition nor even in the memo of appeal before this Court, may now be considered. In order to appreciate the third point it would be necessary to examine the extent and requirement of publication of the notice in terms of Sub-section (2) and service of notice under Sub-section (3) of Section 61. To do so it would be necessary to contrast the provisions of Sub-section (2) and (3) of Section 61 with those of Section 62 of the Act dealing with a case under which the Board is empowered to direct removal of the goods by the importer after one month from the date of placement of the goods in the custody of the Board upon the landing thereof if not removed within one month where the rates have been charged were not paid and in case where rates and charges are paid the time limit extends to the expiry of two months from the date the goods were placed in the custody of the Board. It would be beneficial to quote Section 62 for our present purpose as hereafter :

"62.(1) Notwithstanding anything contained in this Act, where any goods placed in the custody of the Board upon the landing thereof are not removed by the owner or other person entitled thereto from the premises of the Board within one month from the date on which such goods were placed in their custody, the Board may, if the address of such owner or person is known, cause a notice to be served upon him by letter delivered at such address or sent by post, or if the notice cannot be so served upon him or his address is not known, cause a notice to be published in the Port Gazette or where there is no Port Gazette, in the Official Gazette and also in at least one of the principal local daily newspapers, requiring him to remove the goods forthwith and standing that in default of compliance therewith the goods are liable to be sold by public auction or by tender, private agreement or in any other manner.

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(2) The notice referred to in Sub-section (1) may also be served on the agents of the vessel by which such goods were landed.

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(3) If such owner or person does not comply with the requisition in the notice served upon him or published under Sub-section (1), the Board may, at any time after the expiration of two months from the date on which such goods were placed in its custody, sell the goods by public auction or in such cases as the Board considers it necessary so to do, for reasons to be recorded in writing sell by tender, private agreement or in any other manner after giving notice of the sale in the manner specified in Sub-sections (2) and (3) of Section 61."

4.1 Section 61 deals with the case where rates have not been paid or lien for freight is not discharged even after expiry of two months from the time the

goods have been passed into the custody of the Board. In such a case the Board may sale such goods by public auction. Sub-section (2) prescribes that ten days" notice is to be published in the Port Gazette or in the Official Gazette where there is no Port Gazette and also in one principal local daily newspaper. Subsection (2) of Section 61 does not speak of giving notice to the importer. The scheme of this provision clearly indicates that Sub-section (2) has been incorporated in order to obtain better price through auction for the notice and knowledge of the public for participating in the auction. The scheme of Sub-section (2) of Section 61 does not specify any particular form of notice. On the other hand Sub-section (3) of Section 61 makes it clear that the notice shall also be given to the owner if the address of the owner of the goods manifests either on the goods or in any documents at the hands of the Board or otherwise known, by delivering a letter to such address or by sending through post. At the same time a rider has been provided that the title of a bona fide purchaser of such goods shall not be invalidated by reason of omission to send such notice, neither any such purchaser shall be bound to inquire whether such notice was sent. Coupled with this rider, the expression "notice shall also be given" to the address if known, clearly indicates the intention of the legislature not to make the notice upon the owner compulsory or mandatory. In a situation where the owner is supposed to know the impact of Section 61 in relation to its goods when the rates etc. were not paid within the time stipulated and is represented by his clearing agent against whom the owner/importer had filed and contesting a suit on the same subject matter, the owner/importer can not be said to suffer prejudice on account of its having the constructive notice.

4.2 On the other hand Section 62(1) requires service of notice upon the owner if the address of the owner is known to the Board by delivering a letter to such address or by sending through post. Only in case when notice cannot be served upon or address is not known then the notice is to be published in the Port Gazette or in the Official Gazette where there is no Port Gazette and also in at least one principal local daily newspaper requiring the importer to remove the goods forthwith stating that in default the goods are liable to be sold by public auction etc. In addition, u/s 62(2) the notice may also be served on the agents of the vessel by which such goods were landed. By reason of Section 62(3) only upon failure of compliance with the requisition in the notice served upon the owner the Board may sale the goods by public auction after expiry of two months from the date the goods were placed in its custody and that too in accordance with the provisions contained in Sections 61(2) and (3).

4.3 Contrasting these two provisions it appears that Section 62 requires an individual notice to the owner since it requires removal of the goods by the owner and only in default of compliance the sale could be undertaken. Whereas u/s 61 the power to sale is not dependent on any condition of default in its removal. It also does not contemplate giving of notice to the owner and in case of failure to serve the notice is to be published in the Gazette. Thus both the Sections dealing with somewhat dissimilar matters engrafted in two different

provisions providing procedure for sale by auction clearly indicating that the legislature had intended in express terms two different propositions in these two different sections. Inasmuch as Section 62 deals with removal of goods including cases where rates have been paid. In default whereof the Board is empowered to sale in terms of Sections 61(2) and (3). Whereas Section 61 deals with cases where rates have not been paid within the time stipulated. The provision of one section cannot be confused with the other. Since different provisions have been provided for in Sections 61 and 62 respectively, these two sections are independent of each other and each of them are complete code in itself in relation to the subject matter contemplated respectively thereunder.

4.4 Thus a comparison of the provisions, as referred to above makes it clear that Sub-section (2) of Section 61 does not mean a notice to the owner but a notice for sale by auction for the purpose of wide publication of the auction in order to enable the Board to obtain better price. Sub-section (3) is independent of Sub-section (2) dealing with service of notice upon the owner. Inasmuch as subsection (2) does not indicate giving of notice to the owner when Sub-section (3) speaks of giving notice to the owner. Whereas Sub-section (1) of Section 62 speaks of giving notice to the owner and only upon failure for publication thereof in the Gazette. In case notice could be served then Section 62(1) would not require publication of notice in the Gazette for the purpose of giving notice to the owner. The notice u/s 62(1) is not for the purpose of holding any sale by auction. The purpose of such notice is to require the owner to remove the goods and to intimate that in default the goods would be sold by auction. Section 62 contemplates two stages. The first stage requires the owner to remove the goods with an intimation that the goods would be sold by auction in default; the second stage which comes into play on the default of the owner to remove the goods, contemplates holding of sale in the process prescribed in Sections 61(2) and (3). Thus Sub-section (3) of Section 62 makes it clear that once the Board is authorized to undertake sale by auction it has to comply with Sub-sections (2) and (3) of Section 61 irrespective of whether the sale is undertaken u/s 61 or 62. Section 61 does not require the stage contemplated u/s 62 for giving individual notice to the owner within the scope of Section 61(2) but u/s 61(3). Therefore, the effect of non-service of notice is controlled only by Sub-section (3) of Section 61 in respect of the sale u/s 61(2) or a sale u/s 62(3) after the conditions of Section 62(1) is satisfied.

4.5 Thus the defect in the notice under Sub-section (2) would not be a ground for setting aside the sale in view of the clear provisions contained in subsection (3) of Section 61. The conditions contained in Sub-section (3) controls the entire process of auction contemplated u/s 61(1) and u/s 62(3). By reason of provisions contained in Sub-section (3) of Section 61 defect in the notice under Sub-section (2) or non-service of notice or omission to send such notice under Sub-section (3) would not invalidate the sale or passing of the title to a bona fide purchaser in the auction when it specifically mentions so and adds that a purchaser is not bound to enquire whether such notice has been sent. The

purpose of the provisions contained in Section 61 is to keep the Port free of undesirable blockage for making room for successive imports. Such an object cannot be frustrated by interpreting of Section 61 in a manner which would render the object and purpose of Section 61 unworkable and frustrate the same. An interpretation which will advance the object and purpose is preferable.

4.6 In this case it is admitted that the goods were imported in 2001; the rates were not paid; the goods were not cleared till the notice of auction was published; no application for waiver of demurrages was ever made until 11th February 2004 (PB p 64-65) and that too an incomplete one which was not considered by the Port, followed by the second application made on 9th March 2004 (PB p 66). The second application was rejected and the rejection was conveyed to the importer (PB p 87), when the third waiver application was made on 19th March 2004 (PB p 67). Before that the clearing agent of the importer had informed the Port that the agency charges and Port charges were not being paid by the importer. At the same time the importer/owner had intimated the Port that on account of dispute between the importer/owner and the clearing agent the goods could not be cleared. But the owner did take no step either to engage some other agent or to clear the goods for over long three years knowing fully well that the default had already attracted the implications of Section 61. That the owner had knowledge about the development is apparent from its application for waiver of demurrage charges; inasmuch as the owner had indicated the exact figure of the demurrage charges the waiver of which was sought for. That apart the importer was supposed to know that the goods were subject to Section 61 in case the rates and Port charges were not paid within two months from the placement of the goods in the custody of the Board. It was the goods of the owner that was placed in the custody of the Board and the importer/owner was bound to clear the goods through clearing agent. The owner was supposed to keep track of the goods, it cannot claim individual notice once the provisions of Section 61 becomes applicable.

4.7 In view of the scheme of the Act and the situation in which Section 61 operates the principles of natural justice or equity have no role to play in the matter of giving notice to the owner in view of the specific provision contained in Sub-section (3) of Section 61 dealing with a context in which Section 61 is applicable.

4.8 In the circumstances the auction cannot be set aside by reason of absence of any notice u/s 61 on account of any default of the notice u/s 61(2) on the ground that the said notice did not give proper information or notice to the owner. The fact remains that in the Gazette the details of the goods auctioned were mentioned. In the newspaper publication the particulars were mentioned by giving a reference to the lots or consignments with an indication that the details could be had on the enquiry from the Port authority. In our view such a publication in the newspaper would be sufficient compliance of Section 61(2). Inasmuch as such a notice to a diligent person is sufficient and a person knowing

fully well that his goods are subject to Section 61 he cannot complain that the details were not given in the newspaper. Sub-section (2) did not contemplate any notice to the owner but to everyone for the purpose of inviting tender and the details being published in the Gazette and absence of the details in the newspaper publication referring to the lots or consignments and the availability of further details on enquiry satisfies the requirement of Sub-section (2). Then again by reason of Sub-section (3) omission to send such notice would not vitiate the auction expressly provided for indicating the intention of the legislature that any irregularity or any infraction of Sub-section (2) of Section 61 would not confer any right on the importer to assail the auction when Section 61 specifically empowers the Board to hold auction even without giving individual notice to the owner.

4.9 That apart the fact discloses absence of diligence on the part of the owner. The owner failed and neglected to take any steps till 11th February, 1994 and that its application having been rejected once it could not claim any right by making successive application. The fact that it went on making successive application thrice itself indicates that it did not want its application for waiver to be disposed of first or second. On the other hand, the making of the three successive applications indicates that the owner might have been aware of the fact of rejection. This is also apparent from the fact that it could give the exact figure of the demurrages payable of which it had asked for exemption.

4.10 The reliance on the decision in Prabhat Bank Ltd. and Another Vs. Babu Ram, by the learned Counsel for the respondent PANPL is wholly misplaced on the question of notice in view of our discussion above.

4.11 In the circumstances the third point that emerged in course of hearing of the appeal does not seem to be of any substance. At the same time the omission to give notice to the individual owner in conducting auction sale u/s 61 would not invalidate the auction. Admittedly the appellants are bona fide purchasers of the goods in the auction without notice that no notice was sent to the owner. Therefore the absence of notice cannot stand in the way of validity of the auction sale and the passing of title to the auction purchaser. Therefore, the appellant who had paid the full price would be entitled to the release of the goods and the auction purchaser who had deposited the earnest money only shall be entitled to the release of the goods upon depositing of the balance amount within the time stipulated in the auction sale to be calculated from the date of this order since by reason of interim order it was prevented from depositing the balance amount for obtaining the release of the goods.

Section 53 vis-a-vis Sections 61 & 62 :

5. So far as the provisions of Sections 61 and 62 are concerned these are wholly independent of Section 53 of the Act. Section 53 on the one hand and Sections 61 and 62 on the other operates in different fields. There is nothing to prevent the Port authority to exercise its power u/s 61 or 62 during the pendency of any

application u/s 53. Section 61 and 62 does not contemplate of any condition except the condition provided in Sections 61 and 62 .

5.1 Mr. Roychowdhuri appearing for the respondent Port relied on the decision *Ellictt Swaud and Hill Pvt. Ltd. v. The Trustees of the Port of Bombay and Ors.* AIR 1995 Bom 17 (Para 8) and *M/s. Industrial Cables (India) Ltd. and another Vs. The Board of Trustees of the Port of Bombay and others*, , to substantiate his contention supporting Mr. Mitra. In *M/s. Ellictt Swaud and Hill Pvt. Ltd. (supra)* a learned Single Judge of the Bombay High Court had held that failure to pay demurrage for about seven years entitled the Port authority to auction the goods in spite of pendency of appeal or vesting of the property in the Central Government. By reason of this ratio we may safely hold that the Port could sell the goods in auction pending disposal of the application for waiver of demurrage.

5.2 In *M/s. Industrial Cables (India) Ltd. (supra)* a learned Single Judge of Bombay High Court had held that the goods in custody of the Port Trust can be sold in auction for its dues under Sections 61 and 62 independent of Section 48 of the Customs Act which operates in independent parameters in order to sustain his contention that Section 61 is independent of Section 53 which operates in different fields respectively. We are in agreement with the ratio laid down in the said decision, and hold that these two sections are operating in different fields and are independent of each other. Section 61 is a complete Code in itself and is not dependent on Section 53. Even if the demurrage is paid and the goods are removed by the owner to avoid the auction sale, the owner could ask for refund of the demurrage so paid, if his application for waiver, which, could be dealt with independent of Section 61 irrespective of the sale thereunder, is allowed subsequent thereto. The pendency of the application u/s 53 does not affect the effect of Section 61 and the Port's authority to sell thereunder.

Can the sale be set aside : Sections 20 & 64 of the Sale of Goods Act: Impact of:

6. Now the other question that has been raised is that whether the Court could direct release of the goods de hors the condition imposed by the Port authority in its order for release of the goods when a third party interest has been created. Once the sale takes place the rights of the parties are governed by Sections 20 and 64 of the Sale of Goods Act, 1930.

6.1 By reason of Section 20 of the Sale of Goods Act the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed if the contract for the sale of the specific goods is unconditional. In the present case the auction sale was free from all encumbrances and as such was statutorily unconditional. Admittedly the sale involved in this appeal was of specific goods. Admittedly those goods were in a deliverable state. Admittedly the contract of sale was entered into as soon the earnest money was deposited and in one case confirmed by depositing of the full price and in the other case before the full price could be deposited the party was restrained, by an interim

order passed in the writ petition, from depositing the same. It appears that the interim order was obtained immediately after the auction sale took place or closely at heels of the auction sale. This fact leads one to presume that the importer/owner had been keeping vigil of the developments and was waiting on the fringe. Therefore in such a case the sale cannot be set aside. In order to support this proposition reliance may be placed on the decision in *Mrs. Dina Baldev Pathak Vs. The Collector of Customs*, , cited by Mr. Mitra.

6.2 On the other hand Section 64 of the Sale of Goods Act deals with auction sale providing that the sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner and any bidder cannot retract his bid once announcement is made. Admittedly in this case neither the bid come within the purview of Sub-section (4) nor there was any pretension within the meaning of Sub-section (6) nor any of the ingredients contained in Sub-section (3) or (5) appears to have been fulfilled. Therefore the each lot that has been sold by auction is to be treated as separate contract for sale and was complete as soon the auction was announced to be complete. Therefore by reason of Section 20 of the Sale of Goods Act read with Section 64 thereof the property in the goods had passed to the auction purchaser which the Court cannot retract the passing of title until the auction sale is held to be void or invalid. In this case the auction sale could not be held to be void or invalid.

6.3 Therefore the conditions given in the order passed by the Board on the application for waiver pursuant to the interim order passed by the Court in the writ petition cannot be brushed aside lightly and the Port has no authority or jurisdiction to deviate from the terms contained in the said order in view of the creation of the third party interest in the property in the goods. Therefore, the Court could not have directed release of the goods even without the no objection from the auction purchaser in the facts and circumstances of the case. Thus the PANPL was not entitled to release of the goods. In support of this proposition reliance may be placed on the decision in *A.V. Thomas and Co. Ltd. Vs. Deputy Commissioner of Agricultural Income Tax*, , cited by Mr. Mitra. Admittedly the goods were specific goods within the meaning of specific goods as defined in Section 2(14) of the Sale of Goods Act on account of its being identified by lots or consignments was agreed and was subject matter of bid to which the party agreed. A copy of the Gazette publication has been produced before this Court wherefrom it appears that the goods were specifically mentioned in terms of Section 2(14) of the Sale of Goods Act and that these were sufficiently identifiable to be in deliverable state describing them in lots, which were indicated in the newspaper publication by lot numbers.

6.4 Therefore the order deviating from the terms contained in the order of the Port in allowing the application for waiver of demurrage in terms of the order of this Court passed in the writ petition is wholly erroneous and not supported by law. The Court does not exercise any extra-statutory power. Any power that

contravenes the provisions of statute is erroneous, void and without jurisdiction and cannot be sustained and is liable to be set aside on appeal or review, as the case may be, if the infraction of law is glaring. Admittedly in this case the infraction is glaring. In *A.V. Thomas and Co. Ltd. (supra)* it was held that when sale takes place in respect of specific goods and through auction the property in the goods passes, as soon the sale is complete u/s 20 read with Section 64.

6.5 In order to arrive at such a conclusion reference to the Sale of Goods Act would not be out of place since the auction sale u/s 61 of the 1963 Act is complemented by the Sale of Goods Act, so far it deals with the characteristics of the sale undertaken through auction u/s 61 of 1963 Act. Therefore reference to Section 20 read with Section 64 of the Sale of Goods Act being complementary in this case can very well be looked into for the purpose of arriving at the conclusion with regard to the effect of such sale. It was so held in the decision in *The Board of Trustees of The Port of Bombay and Others Vs. M/s Sriyanesh Knitters, .*

6.6 The learned Counsel for the respondent no. 1 PANPL, in order to support the deviation in the order passed by the learned Single Judge from the terms contained in the order allowing the application for waiver passed by the Port pursuant to the interim order granted in the writ petition, cited the decision in *Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another*, to contend that the failure to deliver substantial justice or perpetration or creation of injustice or where conscience of the Court is shocked on the ground of violation of legal process or natural justice, on principle the Court is empowered to interfere. There is no dispute about the proposition but this would not justify the deviation from the terms contained in the order passed by the Port on the application for waiver of demurrage. On the other hand this deviation shocks the conscience of the Court and results into a sufferance of the auction purchaser to whom the property in the goods has passed on account of its being directly in conflict with the legal proposition and statutory provisions. Therefore this decision helps the appellant more than the respondent no. 1. The decision in *Eccles v. Bryant and Anr. 1947 (2) All ER 165* does not seem to help us, the facts and circumstances of the case on account of its being distinguishable.

6.7 It may also be noted that the respondent PANPL had filed a suit as against his clearing agent. Therefore it appears that respondent PANPL was fully aware of its rights and the plea of ignorance cannot be substantiated.

Conclusion :

7. In the facts and circumstances of the case as discussed above we hold that (1) Section 53 and Section 61 of the 1963 Act operate in different field and are independent of each other. (2) In the present case the sale was a sale u/s 61 and not u/s 62 of the 1963 Act. (3) The pendency of an application for waiver u/s 53 of that Act does not eclipse or affect the effect of Section 61 thereof. (4) If the ingredients of Section 61 of the 1963 Act are satisfied, there is nothing in Section

53 of that Act to prevent sale by the Port u/s 61 thereof. (5) In such a situation if the importer/owner pays the rates and removes the goods before Section 61 is resorted to or complete, upon payment even then the owner would be entitled to refund of payment so made if the application u/s 53 is allowed subsequent thereto. (6) Section 61(1) can be resorted to as soon as the ingredients thereof are fulfilled but upon compliance of Section 61(2) which is mandatory. (7) The notice contemplated u/s 61(2) is meant for advertising to general public for the purpose of the auction; it does not require giving of notice to the owner or importer. (8) Section 61(2) does not prescribe any form as such publication of the notice with full particulars in the Gazette either port or official in absence of Port Gazette, together with notice, with reference thereto with lots number mentioned in the Gazette informing that the details would be available on enquiry from the particular office, published in the newspaper would suffice the requirement. (9) Section 61(3) contemplates notice to the owner only if the address of the importer is manifest on the goods or available from the record and that too is optional or additional by reason of the expression "also" used therein. (10) Omission to give notice to the owner has been taken care of in Section 61(3) by express provision that such omission will not invalidate the sale and that the auction purchaser is not obliged to enquire about the service of notice upon the owner. (11) The provisions have been engrafted to clear the port area preventing use of the port as godown for the importers awaiting rise of price, if fallen or seeking opportune moment to clear the goods according to its convenience, and for conferring clear title free from encumbrances upon the auction purchaser; and with that end in view, in order to enable the port to function properly, for encouraging and helping development of trade and commerce in the process of continuance and successive imports by creating room for the new arrivals and to realizing its rates etc. Section 61 has been engrafted in the 1963 Act. (12) Having regard to the facts and circumstances of the case the omission of notice to the owner, in the present case, would not invalidate the sale. (13) Once the auction sale is complete in terms of Section 64 of the Sale of Goods Act, 1930 the same cannot be retracted and the contract is complete. (14) By reason of Section 20 of the 1930 Act once the contract of sale in respect of specified goods in deliverable state, as found in the present case, is complete the title to the goods passes on to the purchaser even though the time for payment or for delivery of the goods or both are postponed. (15) Once the title has passed the same cannot be retracted even by orders of the Court until the sale is held to be void or invalid. (16) The Board in its order passed in terms of the interim order passed in the writ petition was right in asking the owner to produce "no objection" from the purchaser in view of creation of third party interest which is otherwise indefeatable by reason of Section 61(3) of the 1963 Act. (17) The owner had knowledge of the entire development and was waiting on the fringe and was not diligent and had approached the Court only after third party interest was created, a factor which must weigh with the Court while deciding the case having regard to the facts found hereinbefore. (18) In the circumstances the order of the learned single Judge cannot be sustained and is

liable to be set aside. (19) The Court is supposed to take note of fait accompli including subsequent events and pass order to suit a situation as far as law permits.

Order:

8. In the result the appeal succeeds and is allowed. The order of the learned Single Judge appealed against is hereby set aside.

8.1 The remaining goods be released to the respective auction purchaser upon payment, if not already paid, of full price within the time stipulated in the auction sale to be calculated from the date of this order.

8.2 So far as the portion of the goods that has been released in favour of PANPL is concerned the proportionate amount of the sale price paid pursuant to the auction by the auction purchaser be refunded, if deposited, and may not be charged if not deposited, after adjusting the earnest money with the sale price paid for the balance goods left in the custody of the Port Trust.

8.3 It would be open, to the auction purchasers to sue PANPL if they are so advised for damages or otherwise in accordance with law, as the case may be.

8.4 There will however be no order as to costs.