

BOMBAY HIGH COURT

Gulam Hussain Ahmedali

Vs.

Trustees of the Port of Trust Bombay

Transfer Suit No. 4 of 1961

(Tarkunde and Chitale, JJ.)

20.03.1962

JUDGMENT

Tarkunde, J.

1. This suit was filed in the Bombay Small Causes Court for the recovery of Rs. 2,966/- by way of damages. The plaintiffs are a private limited company carrying on business as importers and merchants. The defendants are the Trustees of the Port of Bombay, hereinafter referred to as the Board, a statutory body incorporated under Section 4 of the Bombay Port Trust Act, 1879. The plaintiffs say that they imported four cases of Cellulose Tapes and Bench Dispensers from London, that the four cases arrived at the Bombay docks, that the plaintiffs paid the necessary customs duty on the goods, that the Docks Manager of the Board delivered to the plaintiffs only one of the four cases, and that the remaining three cases were not delivered to the plaintiffs. The plaintiffs say that the three cases were lost when in the custody of the Board, and that they were lost solely due to the acts of negligence, malfeasance and nonfeasance on the part of the Board's administration and also due to want of proper care and caution which the Board were bound in law to take in respect of the said goods. One of the defenses raised in the suit was that the Board are not liable for the misconduct or negligence or malfeasance of their servants and that the Board repudiate their liability under Section 87 of the Bombay Port Trust Act. In view of this defense, the plaintiffs applied to this Court for a transfer of the suit under Article 228 of the Constitution on the ground that, in the plaintiffs' submission, Section 87 of the Bombay Port Trust Act is repugnant to the fundamental rights guaranteed under Articles 14 and 19(1) (f) of the Constitution, and that it was necessary to transfer the suit in order that the constitutional question may be decided by this Court. A bench consisting of the Chief Justice and Chandrachud, J. granted the application, and, while doing so, directed that judgments should not be delivered in eight other suits pending in the Bombay Small Causes Court and six suits pending in the City Civil Court wherein the same constitutional question has been raised.

2. On behalf of the plaintiffs, Mr. Amin argued before us that the second paragraph of section 87 of the Bombay Port Trust Act is repugnant to Article 14 and to Article 19(1)(f) and (g) of the Constitution, and is therefore void and of no legal effect. Section 87 is in the following terms :-

"87. Limitation of suits, etc. - No suit or other proceeding shall be commenced against any person for anything done, or purporting to have been done, in pursuance of this Act, without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding. The Board shall not be responsible for any misfeasance, malfeasance or non-feasance of any employee appointed under this Act; nor, if they should be appointed by the Central Government, under the Indian Ports Act, 1875, Conservators of the port for any misfeasance, malfeasance or non-feasance of any Deputy Conservator, Master-attendant or Harbour-master, or of any assistant or deputy of any such employee, or of any person acting under the authority or direction of or in subordination to any such officer, assistant or deputy :

nor for any damage sustained by any vessel in consequence of any defect in any of the moorings, hawsers or other things belonging to the Board which may be used by such vessel; nor shall the Board, or any of the said employees, be liable in damages for any act *bona fide* done, or ordered to be done, by them in pursuance of this Act. Mr. Amin's objection was confined only to the second paragraph of the section, which says that the Board (i.e. the present defendants) shall not be responsible for any misfeasance, malfeasance or non-feasance of any employee appointed under this Act.

3. In order to appreciate Mr. Amin's arguments, it is necessary to refer to Sections 61A and 61B of the Act. Sub-section (1) of Section 61A provides that the Board shall, immediately upon the landing of any goods, take charge thereof, except as may be otherwise provided in the bye-laws, and store such as are liable in their opinion to suffer from exposure in any shed or warehouse belonging to the Board. Sub-section (2) of that section provides, in substance, that if any owner fails to remove any goods other than those stored in the warehouses appointed by the Board within seven clear days from the date on which such goods shall have been landed, such goods shall remain in the premises of the Board at the sole risk and expense of the owner, and the Board shall thereupon be discharged from all liability theretofore incurred by them in respect of such goods. Section 61B, which was inserted in the Bombay Port Trust Act by the Port Trusts and Port (Amendment) Act (Act XXXV of 1951), runs as follows :

"61-B. Responsibility of Board for loss, etc. of goods. - The responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge shall, subject to the other provisions of this Act and subject also in the case of goods received for carriage by railways to the provisions of the Indian Railways Act, 1890 (9 of 1890) be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872), omitting the words in the absence of any special contract' in section 152 of the

lastmentioned Act."

Section 151 of the Contract Act requires a bailee

"to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

Under Section 152, the bailee is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151. Under Section 161, if by the default of the bailee the goods are not returned, delivered or tendered at the proper time, the bailee is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. The effect of Section 61B, therefore, is that after the Board have taken charge of any goods as required by section 61A(1) the Board are required to take the same degree of care of the goods which a bailee is required to take under Section 151 of the Contract Act, but that they are not responsible for the loss, destruction or deterioration of the goods if they have taken that amount of care.

4. Mr. Amin's arguments in support of his contention that paragraph 2 of Section 87 of the Bombay Port Trust Act contravenes Articles 14, 19 (1)(f) and 19 (1)(g) of the Constitution were based upon the assumption that the liability of the Board under Section 61B for the loss, destruction or deterioration of the goods is limited by the provision in the said paragraph of Section 87 that the Board shall not be responsible for any misfeasance, malfeasance or non-feasance of any employee appointed under the Act. Mr. Amin urged that, in almost all cases, the loss, destruction or deterioration of goods, of which the Board have taken charge, would be the result of some misfeasance, malfeasance or non-feasance on the part of some employee of the Board. In all such cases, the second paragraph of Section 87 would prevent the owner of the goods from recovering from the Board the damages suffered by him. Mr. Amin referred to the corresponding provisions of the Calcutta Port Act, 1890, and the Madras Port Trust Act, 1905, and argued that the second paragraph of Section 87 of the Bombay Port Trust Act, 1879, is discriminatory inasmuch as it imposes a disability on an importer at the Bombay Port which is not imposed on an importer at the Port of Calcutta. Section 112 of the Calcutta Port Act, 1890, corresponds to Section 61B of the Bombay Port Trust Act, and imposes the same degree of responsibility for the loss, destruction or deterioration of goods on the Commissioners of the Port of Calcutta as is imposed on the Board by Section 61B of the Bombay Port Trust Act. However, Section 135 of the Calcutta Port Act, which corresponds to Section 87 of the Bombay Port Trust Act, does not contain any provision similar to the second paragraph of Section 87 of the latter Act. In the Madras Port Trust Act, Sections 40 and 41 correspond with Sections 61B and 87 respectively of the Bombay Port Trust Act, and Mr. Amin agreed that there is no essential difference between these provisions and that a Madras importer is under the same disability as a Bombay importer in respect of the damages suffered by him. Mr. Amin, however, argued that there was no possible justification for the difference between a Bombay importer and a Calcutta

importer with regard to the remedies which are available to them against their respective Port authorities for the loss, destruction or deterioration of their goods, and that therefore paragraph 2 of Section 87 of the Bombay Port Trust Act amounts to a denial of equality before the law, and is void under Article 13 read with Article 14 of the Constitution.

5. It was also urged by Mr. Amin, but apparently with less conviction, that paragraph 2 of Section 87 of the Bombay Port Trust Act puts such a serious limitation on Section 61B that it interferes with the Bombay importer's rights "to acquire, hold and dispose of property" and "to carry on any occupation, trade or business" which have been guaranteed by Article 19(1)(f) and (g) respectively of the Constitution.

6. As already stated, all the objections raised by Mr. Amin to the constitutional validity of the second paragraph of Section 87 are based on the assumption that the responsibility imposed on the Board by Section 61B is limited by the said paragraph of section 87. We are, however, of the view that this assumption is not justified. The scope and the effect of the second paragraph of Section 87 is to protect the Board from the vicarious liability which they might have otherwise incurred for the torts committed by their employees in the course of employment. The words "misfeasance, malfeasance or non-feasance" appearing in the second paragraph of Section 87 embrace all possible acts or omissions commonly known as torts. The same words appearing in Article 36 of the Limitation Act were interpreted by Mr. Justice Farran in *Eassoo Bhayaji v. The S. S. "Savitri"* to embrace "all possible acts or omissions, commonly known as torts by English lawyers; that is to say, wrongs independent of contract." When a cause of action is solely based upon a tort committed by an employee of the Board, the aggrieved party is precluded by the second paragraph of Section 87 from suing the Board on the ground that they are vicariously liable for the tort committed by their employee in the course of his employment. The responsibility, however for the loss, destruction or deterioration of goods, which has been referred to in Section 61B of the Act, is the direct responsibility of the Board itself and not that of any of its employees. It will be noticed that under section 61-A (1) the duty of taking charge of the goods after they are landed is also the duty of the Board. In the normal course, the duties of taking charge of the goods after they are landed and of taking care of those goods are performed by the Board's employees; but since these duties are the duties of the Board, the employees in so far as they are called upon to discharge these duties must be regarded as the agents, and not merely the servants, of the Board. It must follow that if the Board is sued for the loss, destruction or deterioration of the goods, the cause of action is the failure of the Board to take the requisite degree of care by itself or through its agents, and not merely a tort committed by an employee for which the Board is sought to be held vicariously liable.

7. In appreciating the scope of the second paragraph of Section 87, it is necessary to observe that the Board have a number of functions and duties unconnected with the reception, storage and removal of goods brought within the Port area. Section 68 for instance, enumerates the works which are to be executed under the Act, and they include wharves, docks and piers; tramways,

warehouses, sheds, engines and other appliances; lighthouses, light-ships, beacons and pilot boats; laying down moorings and the erection of cranes, scales, etc.; reclaiming, excavating, enclosing and raising any part of the foreshore; construction and application of dredges and other machines; construction and maintenance of buildings; and various other types of works. Under Section 73 (e), the Board is empowered to make bye-laws for keeping clean the harbour and basins and the works of the Board. If in the discharge of these and other functions of the Board an employee of the Board incidentally commits a tort, paragraph 2 of Section 87 prevents the aggrieved party from suing the Board on the ground that the Board is vicariously liable for the damage caused. Paragraph 2 of Section 87 has, however, no application where a breach is committed of a duty imposed on the Board itself.

8. Our view with regard to the scope of the impugned paragraph of Section 87 was naturally adopted and supported by Mr. Amin on behalf of the plaintiffs. Mr. G. N. Joshi, appearing on behalf of the Board, argued that this view is not correct, and further urged

¹ ILR 11 Bom 133

that our duty under Article 228 of the Constitution is only to determine the constitutional validity of the impugned paragraph of Section 87 and not to assess its scope and effect. On the latter part of Mr. Joshi's argument, we must observe that it was not possible for us to consider the constitutional validity of the impugned provision without appreciating its scope and effect. Our view that the responsibility of the Board under Section 61B is not limited by the second paragraph of Section 87 has further led us to the conclusion that it is not necessary for the disposal of the present suit to decide whether the second paragraph of Section 87, in the sense in which we understand it, contravenes any of the fundamental rights guaranteed under the Constitution. Under Article 228 of the Constitution, this Court has undoubtedly the jurisdiction to decide whether a question of law as to the interpretation of the Constitution is required to be determined for the disposal of a suit which was pending in a Court subordinate to it.

9. On the scope and effect of the second paragraph of Section 87, Mr. Joshi pointed out that the responsibility of the Board for the loss, destruction or deterioration of goods under Section 61B has been expressly made "subject to the other provisions of this Act." Mr. Joshi urged that the second paragraph of Section 87 is one such provision. In this connection, Mr. Joshi referred to a number of decisions such as those in *Bombay Steam Navigation Co. Ltd. v. Vasudeo Baburao*², *Lakhaji Dollaji and Co. v. Boorugu Mahadeo Rajanna*³, and *Sheik Mahomed Ravuther v. British India Steam Navigation Co. Ltd.*⁴, where it was held that it is open to a bailee to contract himself out of the obligations imposed under Section 151 of the Contract Act. Mr. Joshi argued that what could be done in a private contract to limit the liability of a bailee under Section 151 of the Contract Act has been done by the Legislature in the second paragraph of Section 87. This argument would have been acceptable if the second paragraph of Section 87 had purported to limit the liability mentioned in Section 61B. As stated above, this provision is intended to meet a very different situation. The second paragraph of Section 87 does not say that the Board shall not be responsible for any loss or damage caused by any misfeasance, malfeasance or non-feasance

of any employee appointed under the Act; it merely says that the Board shall not be responsible for any misfeasance, malfeasance or non-feasance of any employee appointed under the Act. The latter statement relates to causes of action based on torts committed by its employees for which the Board cannot be sued, and is not so wide as to absolve the Board from the responsibility for any loss which has resulted from a breach of a duty imposed on the Board, but which can be attributed to some act or default on the part of its employees.

10. Mr. Joshi then relied on the following passage from paragraph 226 (page 117) of Halsbury's Laws of England (3rd Edition); Vol. II :-

"The custodian is further responsible to the owner of the chattel entrusted to him both for the negligence of his agents or servants, and for their acts of fraud or other wrongful acts, provided that such acts were committed by them within the apparent scope of their authority, either in the supposed interest of their principal or master or in the course of their employment. and although, usually speaking, such a custodian incurs no responsibility where an act of fraud or negligence is committed by a servant or agent not in the course of his employment or outside the scope of his authority, he may be liable if he was negligent in engaging the servant

² ILR 52 Bom 37

⁴ ILR 32 Mad 95 (FB)

³⁴¹ Bom LR 6

whose act occasioned the loss."

In our view, these observations indicate the extent of the care which a bailee is required to take. As provided by Section 152 of the Contract Act, a bailee is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken as much care of the goods bailed as a man of ordinary prudence would take of his own goods. The above observations cannot, in our view, be taken to imply that where a bailee employs a servant to take care of the goods in his charge, his duty as a bailee comes to an end, and that if the goods are then lost on account of the negligence of the servant, a suit against the bailee for the damages occasioned by the loss is a suit solely based upon the tort of the servant for which the bailee is sought to be made vicariously liable.

11. Mr. Joshi then referred to the judgment of Bhagwati J. in *Prince Line Ltd. v. Trustees of the Port of Bombay*⁵, That suit was brought by the owner of a motor vessel against the Board, the Dock Master and a third party. While the vessel was berthed alongside a quay in the Alexandra Docks, certain drums containing film waste lying along the quay caught fire with the result that damage was caused to the plaintiffs' vessel. The suit was dismissed on the ground of limitation, but the learned Judge held on the merits that the Board and the Dock Master had committed a breach of one of the statutory bye-laws made under section 73 of the Bombay Port Trust Act in allowing the drums of film waste to lie on the quay. Dealing with the defense taken under the second paragraph of section 87 of the Act, the learned Judge observed :

"..... It therefore follows that the Board shall not be responsible for any torts committed by any officer or servants appointed under the Act. This defense would avail the first

defendants (the Board) if what was done was done merely a tort committed by the second defendant (the Dock Master). That would be the position only if there was a neglect of the common law duty owed by the defendants 1 and 2 to the plaintiffs. This defense, however, would not avail the first defendants if the damage which was suffered by the plaintiffs was the consequence of the breach of a statutory duty."

It is thus clear that this decision, in so far as it is relevant to the case before us, supports the view which we are inclined to take of the scope of the second paragraph of section 87. It will be observed that, in the case decided by Bhagwati, J., no question regarding the liability of the Board as a bailee was involved. But the observations of Bhagwati, J., are useful in showing that the second paragraph of section 87 only absolves the Board from the vicarious liability for torts committed by its employees.

12. Mr. Joshi also referred to a judgment of Tendolkar, J., in *Ahmedabad Jupiter Spg., Wvg. and Mfg., Co. Ltd. v. Trustees of the Port of Bombay*⁶. This suit was filed against the Board to recover damages for refusal to deliver to the plaintiffs certain drums of caustic soda. The Shed Manager of the Board had refused delivery on the ground that he believed that the goods belonged to another consignee, and this action of the Shed Manager was supported by the Chairman of the Board. Dealing with the defense of the Board taken under the second paragraph of section 87, the learned Judge observed :-

⁵ O. S. Suit No. 1592 of 1943 decided on 3-2-1949

⁶ O. S. Suit No. 652 of 1949 decided on 16th September, 1953

"Now the first part of this sub-clause (i. e., the second paragraph of section 87) obviously relates to liability of the employer for the torts committed by his officers or servants. In common law, the employer would be liable for such torts; but in the case of public officers, it is usual in statutes to confer upon them an indemnity in respect of tortuous acts of their servants."

The learned Judge went on to observe that, assuming that this paragraph would afford protection to the Board for the acts of their officers or servants, the Board was not absolved from its responsibility because the Chairman of the Board had supported the action of the Shed Manager in refusing to give delivery of the drums to the plaintiffs. This decision also, in so far as it is relevant for our present purpose, shows that the second paragraph of section 87 protects the Board from the vicarious liability for the torts committed by its employees, but does not extend to cases where the Board is sued for a breach of duty on its part.

13. We are accordingly of the view that the second paragraph of section 87 of the Bombay Port Trust Act does not limit the liability of the Board under section 61-B of the Act. It is, therefore, not necessary for the disposal of this suit to decide whether the second paragraph of section 87 contravenes any of the fundamental rights guaranteed by the Constitution.

14. The suit will accordingly be returned to the Bombay Small Causes Court for disposal

according to law.

15. Under the circumstances of the case, there will be no order as to costs in this Court.
Suit returned.