

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : 17.05.2012

DECIDED ON : 17.08.2012

RFA (OS) 6/2005
CM APPL.6863, 8355-8356,
11337/2005

THE AIRPORTS AUTHORITY OF INDIA Appellant
Through: Ms. Maldeep Sidhu, Advocate.

versus

M/S DEEPAK INDUSTRIES LTD & ANR. Respondents
Through: Mr. J.R. Bajaj, Advocate for Resp-1.
Mr. D.R. Bhatia, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

%

1. The present appeal is directed against a judgment of the learned Single Judge dated 07.02.2005 decreeing the suit filed by M/s. Deepak Industries Ltd. (hereafter called “the plaintiff), to the extent of ₹.13,37,586/-, with interest @ 10% compounded quarterly from 23.12.1999 till payment.

2. The plaintiff had filed a suit for recovery of ₹.35,25,000/-, alleging that it imported goods under three invoices. Pending assessment and payment of Customs Duty, the goods were warehoused by the appellant, i.e. Airports Authority of India (hereafter called “the AAI”). It was discovered later that the goods were misplaced or stolen. It is alleged that the plaintiff

had made payments to the foreign supplier for the consignment and even paid Customs Duty in respect of one consignment. The plaintiff had claimed not only the value of goods, including the Customs Duty and Interest for certain period but also damages on account of loss of reputation. The suit had impleaded AAI and the Customs authorities. The Customs authorities, impleaded as second defendant, were ex-parte. The plaintiff had, while making several allegations against the second defendant, carefully chosen not to claim any relief.

3. The AAI denied its liability. It had contended that the plaintiff had misappropriated the consignment in question in collusion with its agents and some other employees in and around the airport. The written statement also pointed-out that the consignment dated 25.09.1997 was taken-up and a Customs Examination Order was made on 24.10.1997. Yet the plaintiff approached the authority on 20.05.1998 when the assessed amount was deposited. It was stated that the consignment could not be found or traced despite all efforts to trace it. AAI alleges that the matter was reported to the police but there was no progress due to deliberate non-cooperative attitude of the plaintiff. As regards the consignment dated 21.07.1997 covered by the Bill of Entry dated 14.08.1997 (No.5677443), produced as Ex.PW-1/47, it was stated that the Examination Order was made on 16.08.1997 but at no stage did the plaintiff approach the defendants for requisitioning the consignment for examination and there was no activity record in the authority's computer systems supporting the claim. Similarly, it received the consignment which landed on 18.10.1997 (Ex.PW-1/70). It is submitted that the Bill of Entry was filed as late as on 24.08.1998. This consignment too

could not be traced despite all best efforts and a report to the police was filed for detailed investigation.

4. The AAI submitted in the written statement that it took due and proper care of the cargo as expected of it, in fulfillment of its duty as a statutory duty under Section 45 of the Customs Act. It describes the details whereby such goods are kept in a secured area and guarded by a large number of personnel, i.e. 484 trained security personnel constantly. It is stated that the cargo movement is checked at the time of receiving from the airline, in the bonded area, at the import delivery area and the main gate. It is stated that in any event, the plaintiff's liability is fixed in respect of the amounts specified in the rules incorporated in the Carriage by Air Act. The AAI further alleges that the plaintiff did not show any eagerness for prompt action for clearance of consignment in view of the fact that the Bills of Entry were filed after a gap of 7-10 months after the consignment landed in India. Provisions of Section 48 of the Customs Act are invoked to say that such goods would have been automatically disposed of.

5. The parties went to trial on the following issues:

“1. Whether the plaintiff is entitled to recover the amount as claimed? OPP;

2. Whether the plaintiff is entitled to any interest? If so, at what rate and for what period? OPP;

3. Whether there was no negligence on the part of defendant No.1? If so to what effect? OPD;

4. Relief.”

6. Learned Single Judge, after going through the record noticed that remittances were made on behalf of the plaintiff by its banker to the foreign buyer to the extent of US\$ 9871/- i.e. Rs. 3,88,181/- (Ex.PW-1/31). The remittance to the foreign buyer debited on account of the plaintiff to the extent of Rs. 3,62,411/- was proved by Ex.PW-1/64. A similar amount of Rs. 4,16,227/- (Ex.PW-1/85) for the payment of another consignment was held to have been proved. The learned Single Judge also held that the sum of Rs. 1,69,823/- was paid towards Customs Duty, i.e. Ex.PW-1/8. It was further held that the plaintiff had by Ex.PW-1/13 dated 15.07.1998 furnished all requisite documents for clearing the consignment and followed it up with several other reminders, i.e. Ex.PW-1/14 and Ex.PW-1/20.

7. In the light of the above material, the judgment held that the plaintiff proved remittances by its banker to the foreign supplier, debited to its account and also established payment of Customs Duty. It was further held that the defendant had admitted custody of the goods in the deposition and cross-examination to the Court. It was noticed that the authority did not lead any evidence that the plaintiff or its agent stole the goods, as alleged in the written statement. In para 11 of the impugned judgment, the Court notices that the Authority's representative, deposing as a witness admitted that no letter or notice had been issued to the plaintiff informing it that since goods were not cleared or lifted, an auction of the goods would be held. The witness had further admitted in cross-examination that delay on part of the importer did not absolve the Authority and that in the event of the goods not being cleared within 120 days of the import, an auction takes place after notice to the consignee.

8. The Court held that the decision in *Sprint RPG India Ltd. v. Commissioner of Customs* 1995 (2002) DLT 455 was of no relevance and that the ruling of *res ipsa loquitur* apply in *Indian Airports Authority of India v. Ashok Dhawan* 1999 (106) ELT 16 was applicable. In view of these findings, it was held that the defendant Authority was negligent in not keeping goods in safe custody and a decree for the amount mentioned earlier with interest was granted to the plaintiff.

9. It is urged on behalf of the appellant/defendant that the impugned judgment and decree is unsustainable in law. The appellant relies upon Article 72 of the Limitation Act to say that the plaintiff's claim being one for recovery of damages for the alleged loss of imported goods, was filed beyond the time admissible, i.e. one year. It is emphasized that the words "*when the act or omission takes place*" is descriptive of the category of cases covered by the plaintiff's claim. Reliance is placed upon Section 48 of the Customs Act which states that if the goods are not removed within 30 days from the date of unloading and search in the warehouse, it is open to the consignee or the person entitled to the goods to make the claim. In such case, it is urged that the said 30-day period has to be reckoned from the date of unloading of the goods, i.e. 19.07.1997/20.09.1997 and 18.10.1997. If that is the correct position, submits the appellant, the suit ought to have been filed within one year, i.e. before 18.10.1998. However, the plaintiff not only filed the suit beyond the prescribed time but in fact paid Customs Duty in respect of only one consignment on 20.05.1998 and approached the Customs Authority for clearance by filing Bill of Entry as late as on 24.08.1998. Having willfully defaulted for this period, and even placed material on

record to suggest that the plaintiff was unable to bear the Customs Duty on account of administrative or other lapses, it could not have validly made a claim for the value of the goods or the damages.

10. It is emphasized by the appellant in addition that apart from the sum of Rs. 1,69,823/- paid on 20.05.1998 in respect of the consignment of 20.10.1997/18.10.1997 (Ex.PW-1/70), there is no material on record to suggest that the assessed duty on the other consignments was ever paid. It was also stated that there is no material on record suggestive of the fact that the Customs authorities had unduly delayed completing the assessments in respect of two consignments.

11. On behalf of the plaintiff, it is urged that there is no infirmity in law or in the appreciation of facts and evidence by the learned Single Judge in the impugned judgment. It is submitted that apart from the ruling in AAI relied upon in the impugned judgment, the judgment of *State of Andhra Pradesh v. Challa Ramkrishna Reddy* 2000 (5) SCC 712 supports the claim in the suit. It is submitted that Article 72 of the Limitation Act would apply where a public authority does an act under power conferred or deemed to confer by Act by which injury is caused to another person who invokes jurisdiction of the Court to claim compensation. However, where the public officer or authority could not have committed the act or passed the order, no color of the statutory authority claimed by it operates and Article 72 would be inapplicable.

12. The plaintiff also relies upon the decision in *State of Punjab v. Modern Cultivators*, AIR 1965 SC 17, which had preferred the judgment of

the Patna High Court in *Secretary of State v. Lodna Colliery Company Limited* AIR 1936 Patna 513 in the following terms:

“The object of the article is the protection of public officials, who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to cause of action. It is against such actions for tort that the status gives protection.”

13. It is further argued that in this case, insurance could not be claimed by the plaintiff on account of unavailability of the certificate regarding loss of goods.

14. Learned counsel for the respondent plaintiff highlighted that neither in the written statement nor in the documents filed did the defendant/AAI factually dispute about receipt of goods. Indeed, the plaintiff had produced all the Airway Bills, relative invoices and the concerned payments made through documentary credits negotiated by its bankers. Furthermore, all the Bills of Entry in respect of the consignments covered by the suit had been placed on the record; even the *challan* and receipt for Rs.1,69,823/- paid towards Customs Duty was a matter of record. In view of these materials, it was not open to the AAI to question the findings. There is neither any error

in appreciation of facts nor is the judgment untenable on the ground of error of law.

Analysis

15. It is evident from the above discussion that the plaintiff had urged, and placed extensive materials on record, showing that three consignments were received on its behalf, in respect of which Bills of Entry were duly filed. The Appellant is correct, when it contends that duty was not paid in respect of all these Bills of Entry, but that only one consignment was paid for, to the extent of Rs. 1,69,823/-. However, it is an incontrovertible fact that the suppliers' invoices, payment details through certificates of bankers, duly established that the full value of these goods were paid to the foreign supplier/consignor. The Appellant does not question the underlying transactions of purchase of these goods; nor can it, considering that there was no contrary material placed on record by it, or any effective cross examination on that score. Therefore, the fact that the Plaintiff did not pay duty, or approached the Customs authorities late, does not in any manner implicate or detract from the Appellant's duty of exercising diligent and proper care of the goods, till they were claimed and cleared. Maybe, if the plaintiff had neglected to clear the goods, after assessment, the Airport Authority would have, after issuing notice in terms of Sections 45, 46 and 48 of the Customs Act, entitled it to dispose of the goods, and apply the proceeds to realize customs duty dues (statutorily chargeable) and its detention or demurrage charges. However, those facts are not pleaded or proved before the Court. This court is also un-persuaded by the Appellant's submission that the principle of *res ipsa loquitor* did not apply. Even if it

were inapplicable, *arguendo*, the plaintiff proved all the foundational facts in the case, such as their entry into India, on the dates alleged, the payment made to their suppliers, evidence of due filing of Bills of Entry, assessment of two of those, and payment towards one of them. It had also alleged that the non-availability certificate in respect of the consignments was not forthcoming, due to which it could not claim any insurance amount towards the lost or stolen consignment. Therefore, the impugned judgment cannot be faulted with in holding that the goods belonging to the Plaintiff went missing while they were in the care and custody of the defendant Authority.

16. The next question is whether the suit was filed within the time, or was it time barred. The plaintiff alleges that the longer period prescribed in Article 113 of the Limitation Act, 1963 (“the Act”) applied; the defendant/Appellant on the other hand, contends that the suit should have been preferred within one year from the date of failure to perform the statutory duty.

17. The two relevant provisions are extracted below:

“Part VII Suits relating to Torts

<i>Article</i>	<i>Description of suit</i>	<i>Period of Limitation</i>	
72	<i>For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends</i>	<i>One year</i>	<i>When the act or omission takes place</i>

<i>PART X - Suits for which there is no prescribed period</i>			
<i>113</i>	<i>Any suit for which no period of limitation is provided elsewhere in this Schedule</i>	<i>Three years</i>	<i>When the right to sue accrues.</i>

18. The AAI urges that the correct provision, and the shorter period of limitation, provided under Article 72 applies in this case, resulting in the suit being time barred, as it is a case of “*compensation for doing or for omitting to do an act*”. According to counsel, the goods were warehoused by virtue of operation of Section 45 of the Customs Act, and not as a result of contract. Sections 45 and 48 of the said Act read as follows:

“45. Restrictions on custody and removal of imported goods.

(1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption are or ware housed or are transshipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub- section (1) or under any law for the time being in force, -

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.

(3) 2[Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub- section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.".]

xxxxx

xxxxxxxxxx

xxxxxxxxxxx

48. Procedure in case of goods not cleared, warehoused, or transhipped within thirty days after unloading. If any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transhipped thirty days from the date of the unloading thereof at a customs station or within such further time as the proper officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer and with the permission of the proper officer be sold by the person having the custody thereof: Provided that-

(a) animals, perishable goods and hazardous goods, may, with the permission of the proper officer, be sold at any time;

(b) arms and ammunition may be sold at such time and place and in such manner as the Central Government may direct. Explanation.- In this section, " arms" and" ammunition" have the meanings respectively assigned to them in the Arms Act, 1959 . (54 of 1959). ”

19. The AAI is right in contending that its capacity as bailee of the goods is on account of operation of provisions of the Customs Act. The issue still moot is whether that circumstance can be said to clothe its omission (to take care of the goods) one falling under Article 72. A textual reading of Article shows that to attract the shorter period of limitation, the act or omission must be one which is in pursuance of an enactment and thus a statutory duty. Mere omission or failure in following statutory duty is not covered by Article 72 of the Act. In *Modern Cultivators*, the allegation against the State

was that it failed to maintain the canal properly resulting in flooding and consequently extensive damage to crops. The State urged that the omission was on account of failure in performance of a statutory duty, under the Northern India Canal and Drainage Act, 1873. According to the Supreme Court the failure was not in pursuance of the statutory authority to attract Article 72 of the Act. The Supreme Court held, in *Modern Cultivators* (in the context of the old Article 2 which corresponds to the present Article 72, that:

“But Art. 2 cannot apply to omissions in following the statutory duties because it cannot be suggested that they are 'in pursuance of any enactment'. Cases of -malfeasance, misfeasance or nonfeasance may or may not have statutory protection. Act or omission which can claim statutory protection or is alleged to be in pursuance of a statutory command may attract Art. 2 but the act or (mission must be one which can be said to be in pursuance of an enactment. Here the suit was for compensation for damage consequent on a break in the canal on August 15, 1947. The only act or omission could be the opening and closing of the channel for silting operations. That was before June 1946. The third column of Art. 2 provides the start of the limitation of 90 days" when the act or omission takes place." The period of limitation in this case would be over even before the injury if that were the starting point. This subject was elaborately discussed in Mohamad Sadaat Ali Khan v. Administrator Corporation of City of Lahore(I.L.R. [1945] Lah. 523 F.B.) where all rulings on the subject were noticed, Mahajan J. (as he then was) pointed out that "the act or omission must be those which are honestly believed to be justified by a statute". The same opinion was expressed by Courtney Terrell C.J., in Secretary of State v. Lodna Colliery Co. Ltd. (1) in these words :-

"The object of the article is the protection of public officials, who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the

terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute; secondly, the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself, a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection."

These cases have rightly decided that Art.2 cannot apply to cases where the act or omission complained of is not alleged to be in pursuance of statutory authority."

20. Similarly, in *Chhalla Ramkrishna Reddy* the Supreme Court held about Article 72, that:

" This Article would be attracted to meet the situation where the public officer or public authority or, for that matter, a private person does an under power conferred or deemed to be conferred by an Act of the Legislative by which injury is caused to another person who invokes the jurisdiction of the Court to claim compensation for that act. Thus, where a public officer acting bona fide under or in pursuance of an Act of the Legislature commits a "tort", the action complained of would be governed by this Article which, however, would not protect a public officer acting mala fide under colour of his office. The Article as worded, does not speak of "bona fide" or "mala fide" but it is obvious that the shorter period of limitation, provided by this Article, cannot be claimed in respect of an act which was malicious in nature and which the public officer or authority could not have committed in the belief that the act was justifiable under any enactment."

21. Article 72 therefore, has limited application and applies to protect *bona fide* exercise of power, or *bona fide* omission to do something, under belief that such act or omission is covered by statutory authority. It is not only a limitation, but also restriction of ordinary rights and has to be strictly

construed. In *Selmes v. Judge* (1871) L.R. 6 Q.B. 724 the position was stated as follows:

"It has long been decided that such a provision as that contained in this section is intended to protect persons from the consequences of committing illegal acts, which are intended to be done under the authority of the Act of Parliament, but which, by some mistake, are not justified by its terms, and cannot be defended by its provisions."

Another way of looking at the matter, from the perspective of this case, would be that only if the AAI had urged that it lost the goods from its custody, as a result of some omission (or act) which it *bona fide* thought was part of its duties, (traceable to some provision of law) would it be entitled to successfully say that the shorter period of limitation applied. Therefore, neglect of duty, whether statutory or otherwise, does not afford the State or state agency shelter of the shorter period of limitation.

22. In view of the above discussion, it is held that the plea of the Appellant that the suit was time barred, as it was filed beyond the period of one year, under Article 72 of the Limitation Act, is meritless. As regards the factual findings in the impugned judgment, this Court has already noticed that they do not call for interference, and are unexceptionable. Consequently, the appeal fails, and is dismissed.

S. RAVINDRA BHAT, J.

S.P. GARG, J.

AUGUST 17, 2012