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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 2533 OF 1998

M/S. JEEVES IMPEX,
a partnership firm, registered under the Indian Partnership Act, 1930, carrying on business at A-Shiv Sagar Estate (Basement), Dr. A. B. Road, Worli, Mumbai 400 018 … Plaintiff

versus

1. **MAERSK LINE INDIA PVT. LTD.**
a Private Limited Company, incorporated under the Companies Act, 1956, having its registered office at Hamilton House, J. N. Heedia Marg, Ballard Estate, Mumbai 400 038

2. **M/S. EXIMPLUX REPRESENTACIONES, C.A.**
Venezuela, EDIF, Alborada, Guaicapuro, El Lianio, Caracas, Venezuela

3. **UNION BANK OF INDIA,**
a body corporate, constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having its Central Office at 239, Backbay Reclamation, Mumbai 400 021 and Khand Bazar Branch at 109, Kazi Sayed Street, Mumbai 400 003 … Defendants

APPEARANCES

FOR THE PLAINTIFF	**Ms. Ruby Taneja**, *i/b Shama Taneja*.
FOR THE DEFENDANT	**Mr. V. K. Ramabhadran, Senior Advocate**, *i/b Subra Karmarkar*.

CORAM	:	**G. S. Patel, J.**
JUDGMENT RESERVED ON	:	**13th February 2015**
JUDGMENT PRONOUNCED ON	:	**30th March 2015**

JUDGMENT:

1. The Plaintiff, M/s. Jeeves Impex, is a partnership firm engaged in the business of manufacture and export of Indian readymade garments. This suit arises out of one particular export of 100% cotton garments in six consignments to M/s. Eximplus Representaciones C.A., Defendant No. 2, a corporate entity in Caracas, Venezuela. The export is on the basis of an alleged oral contract said to have been entered into some time in July 1993.

2. The Plaintiff contends that it routinely engaged the sea carriers Maersk Line India Pvt. Ltd.,[1] Defendant No. 1 herein, for the transport of its goods from Mumbai to Venezuela. Defendant No. 1 is an agent of P&O Containers Limited, its principal. Defendant No. 1 issued Bills of Lading (in the name of its principal, P&O Containers Limited) for the six consignments to the order of one Banco Del Caribe, the 2nd Defendant's Venezuelan bank.

[1] Formerly, at various times, P&O (Indian Agencies) Private Limited and P&O Nedlloyd (India) Private Limited.

There is, as we shall see, more than a little uncertainty as to the precise terms of the contractual arrangements between the Plaintiff and its purchaser, Defendant No. 2, on the one hand (the oral nature of which I will turn to presently), and the Plaintiff and Defendant No. 1 on the other. The Plaintiff alleges that the Bills of Lading were sent from the Plaintiff's bank, Union Bank of India, Defendant No. 3 herein, to Banco Del Caribe. Defendant No. 2, the Plaintiff says, was to remit the amounts specified on the Bills of Lading to Banco Del Caribe, in exchange for the original Bills of Lading; upon presentation of these Bills of Lading to Defendant No. 1, Defendant No. 2 was to receive delivery of the goods. However, Defendant No. 1 delivered the goods to the Venezuelan Customs Authority instead of directly to Defendant No. 2, without obtaining the original Bills of Lading from Defendant No. 2. The goods seem to have ultimately reached Defendant No. 2, but Defendant No. 3, and consequently, the Plaintiff, has not received the amounts payable on the goods.

3. At this stage, it must be noted that the Plaintiff has dropped its claim against the 2nd Defendant, apparently because it could not serve that defendant; and has compromised and settled its claim against the 3rd Defendant, the Union Bank of India. What the Plaintiff claims from the carrier, the 1st Defendant, is the invoice value of its shipments to the 2nd Defendant, and, secondly, damages. The entire claim of the Plaintiff seems to me to be entirely misconceived and perhaps deliberately so. The Plaintiff's principal debtor is the 2nd Defendant. It is no longer sued. The terms of the transaction, at least so far as can be gleaned from the record, were simply that the 2nd Defendant was to route payment to the Plaintiff through the 2nd Defendant's Venezulean bank, Banco del Caribe,

and the 3rd Defendant, the Union Bank of India. There was, and this seems not to be in doubt, no question of any documents being required to be 'negotiated' by either bank. It is also admitted that the only reason the Banco del Caribe did not remit the invoice value to the Union Bank of India (the Plaintiff's bankers) was because the Banco del Caribe had not been put in funds by the 2nd Defendant; not because any documents requiring negotiation were found to be discrepant. Yet, the Plaintiff's claim is based on some halfway betwixt-and-between formulation: it simply claims that since the 1st Defendant did not deliver the goods against the original Bills of Lading, it is liable for the invoice value and in damages to the Plaintiff, wholly ignoring the fact that the goods were, admittedly, delivered to the Plaintiff's principal debtor, the 2nd Defendant; and that it was the 2nd Defendant that did not remit the funds. Nothing in this transaction is quite what it seems. Indeed, it is more than somewhat surprising that any such contract should be 'oral' or 'verbal' given its value, and there is some material to indicate that the Plaintiff is or was being investigated precisely because of this. The fact that the 2nd Defendant received the goods is admitted in the plaint itself. The 2nd Defendant also made part payment and confirmed its indebtedness to pay the rest. Even assuming that the 1st Defendant failed or was remiss in not collecting the original Bills of Lading, this still does not establish how such a default would make the 1st Defendant liable on the invoice value of the goods; and of the so-called 'negligence', which must not only be pleaded but also proved, there is no evidence at all.

4. Apart from pleading limitation, on which an issue has been framed, the 1st Defendant has clearly set out that the original Bills

of Lading were sent by the Plaintiff to the 3rd Defendant, which endorsed them to Banco del Caribe, which, therefore, solely had title. The original Bills of Lading were returned some time in November 1994. On that date, the goods under those Bills of Lading had already been delivered to the 2nd Defendant, and the Bills of Lading were therefore by then 'spent' and no longer negotiable. The other allegations made by the Plaintiff in relation to its contract are also denied.

5. Issues were framed on 13th November 2014. These are reproduced below, with my findings against each.

SR. NO.	ISSUES	FINDINGS
1	Whether the suit is barred by law of limitation?	Yes.
2	Whether the suit is liable to be dismissed for want of cause of action as alleged by the 1st defendant in paras 6, 7 and 8 of the written statement?	Yes.
3	Whether the plaintiffs prove that they had entered into contract with the second defendants?	Yes.
4	Whether the plaintiffs prove the value of the six bills of Lading as per details furnished hereinbelow as alleged in para 2 of the plaint?	Does not survive.

5	Whether the plaintiffs prove that defendant No. 1 were to receive delivery of the goods only upon making payment to their bankers as alleged in para 3 of the plaint?	Does not survive.
6	Whether the 1st defendant prove that they had discharged their obligations in terms of Bills of Lading which they had issued?	Does not survive.
7	Whether the plaintiffs prove that the Bank Guarantee furnished by the second defendants in favour of the Customs Authorities was forged as alleged in para 22 of the plaint?	Does not survive.
8	Whether the plaintiffs prove that the 1st defendant is liable to pay sum of US $41,209 as alleged?	No.
9	Whether the plaintiffs prove that the have suffered loss in the sumo f Rs.2,48,00,000/- or any part thereof towards damages as alleged?	No.
10	Whether the plaintiffs are entitled to any interest and if so at what rate?	No.
11	What orders and what reliefs?	Suit dismissed.

6. I propose to consider Issue Nos. 2, 5 and 6 together[2] as they concern the liability of Defendant No. 1 in this suit, and I have held that, as regards Issue No. 2, the suit is liable to be dismissed for want of cause of action against Defendant No. 1. Issue Nos. 5 and 6, therefore, do not arise. I have also held the suit to be time-barred.

[2] Issue No. 5 is actually a reference to Defendant No. 2, not Defendant No. 1.

Given my findings on Issue Nos. 1 and 2, Issue Nos. 4 and 7 also do not survive. Issue Nos. 8, 9 and 10 must consequently be answered in the negative. As regards Issue No. 11, the suit is dismissed.

7. I will begin with a general comment. The alleged oral contract was entered into between the Plaintiff and Defendant No. 1 some time in July 1993. According to the Plaintiff, by a letter dated 24th November 1993 sent by Telex/Fax and addressed to Defendant No. 1, the Plaintiff inquired about the status of the consignments. Defendant No. 1 replied on 9th December 1993, informing the Plaintiff that two containers had been delivered to Defendant No. 2. The Plaintiff made further inquiries on 18th January 1994 and 24th March 1994. As Defendant No. 3 still had not received any remittance from Banco Del Caribe for the goods, it addressed a letter to Defendant No. 1 dated 18th June 1994 inquiring about the delivery of the containers. The chain of correspondence thus far is not on record, although Defendant No. 1 does not deny it in its Written Statement. Defendant No. 1 replied on 6th July 1994[3] with details of the dates of release of the containers as per seven Bills of Lading. As there was still no receipt of payment from Banco Del Caribe, Defendant No. 3 by a letter dated 8th September 1994[4] requested Defendant No. 1 to send copies of all of the original Bills of Lading listed therein. In the meantime, it seems that Banco Del Caribe returned all of the original Bills of Lading to Defendant No. 3 without remitting any payment. On 1st December 1994, the Plaintiff, through its advocates, addressed a letter to Defendant No.

3 Exhibit P-35

4 Exhibit P-36

1[5] complaining that the goods had been delivered without obtaining the original Bills of Lading from Defendant No. 2. On 25th January 1995, Defendant No. 1 replied to Defendant No. 3,[6] forwarding a message from their New York office to the effect that the goods were released to the Customs Authority in accordance with the usual practice in Venezuela, and that the Customs Authority then controls the release of the goods to the consignee. It also referred to a guarantee provided by Banco Del Caribe to the Customs Authority. By its letter dated 28th January 1995,[7] Defendant No. 3 requested Defendant No. 1 to furnish documentary evidence of the release of the goods, but none was received. None is on record today. Relevantly, there is a letter dated 10th April 1995[8] from Banco Del Caribe to Defendant No. 3 stating that the former never issued a bank guarantee in favour of Defendant No. 1. Much correspondence ensued, resulting in the filing of this suit for the outstanding sum on the goods, with interest, amounting to Rs. 53,28,687, and for damages in the amount of Rs. 2,48,00,000.

8. Now, as stated in Defendant No. 3's Written Statement filed on 12th December 2006, Defendant No. 3 instituted Suit No. 3350 of 1997 in this Court against the Plaintiff and Defendant No. 1 for various reliefs. This was transferred to the Debts Recovery Tribunal, Mumbai in 2001 and came to be numbered Transfer Application No. 660 of 2001. The Plaintiff submitted a proposal for settlement that was accepted by Defendant No. 3, the terms of

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5 Exhibit P-39
6 Exhibit P-40
7 Exhibit P-41
8 Exhibit P-45

which were recorded in a letter dated 9th January 2001. Consent terms dated 29th September 2001 were then entered into before a Lok Adalat for the settlement of the proceedings. The Plaintiff, therefore, admittedly has absolutely no surviving cause of action against Defendant No. 3. Worse, the Plaintiff failed to serve Defendant No. 2 in the nine years following the institution of this suit. The suit as against Defendant No. 2 was therefore dropped by an Order of this Court dated 22nd February 2007 for want of prosecution. The Plaintiff never even attempted to join Banco Del Caribe in its suit. Thus, the suit survives only as against Defendant No. 1, a mere carrier in all of this. Defendant No. 1 itself was an agent acting on behalf of its principal, P&O Containers Limited. The Plaintiff has never attempted to join the principal P&O Containers Limited. Quite apart from these infirmities, the Plaintiff's entire suit is barred by limitation, as discussed below.

9. But let us look at the reliefs sought in this suit. They are in two parts. The first is a claim for the outstanding amount on the invoices. This, clearly, arises out of the contractual liability imposed by the invoices. These invoices were issued from the Plaintiff to Defendant No. 2. Defendant No. 1 has no privity of contract with the Plaintiff in this regard; it cannot be made liable to pay for goods that were sold by the Plaintiff to Defendant No. 2 in a transaction that does not concern it at all, save to act as a delivery agent. The goods were delivered to Defendant No. 2; that is the extent of Defendant No. 1's liability. This claim, then, clearly fails. The second prayer is for damages in the amount of Rs. 2,48,00,000. As against Defendant No. 1, this only survives in the form of a claim for damages resulting from Defendant No. 1's negligence. I will leave

aside, for the moment, the question of whether or not Defendant No. 1 was in fact negligent; this is far from clear. But even if we assume that Defendant No. 1 might be held liable in tort for negligence in delivering the goods to the Venezuelan Customs Authority instead of to Defendant No. 2 against original Bills of Lading, this is not enough to found a decree in damages. There is no causality between Defendant No. 1's conduct and the Plaintiff's losses; this negligence has no nexus with the losses allegedly suffered by the Plaintiff. The goods were admittedly delivered to Defendant No. 2. Those losses, then, stem from the 2nd Defendant's withholding of payment. There is no evidence led to suggest that had Defendant No. 1 insisted on effecting delivery against the original Bills of Lading, the Plaintiff would have received its dues, because, as borne out by Banco Del Caribe's letter, Defendant No. 2 had not even put Banco Del Caribe in sufficient funds. In fact, Defendant No. 2 was required to make payments for the goods to Banco Del Caribe in exchange for the Bills of Lading before delivery; the fact that they had not done so is prior in time and therefore (in the absence of any evidence to the contrary) seemingly independent of any error on the part of Defendant No. 1. The Plaintiff produces no correspondence between Banco Del Caribe and Defendant No. 3 to show that had Defendant No. 1 insisted on delivery as against the Bills of Lading, Defendant No. 2 would have made the requisite payments. We are not even provided with any evidence of the contractual arrangement between the Plaintiff and Defendant No. 2; there is not a single document concerning this contract, and we are asked to rely only on the word of the Plaintiff that there was an oral one.

10. A word, first, on the Bills of Lading themselves. The letter dated 9th July 1994 from Defendant No. 1 to Defendant No. 3 provides dates of delivery for seven Bills of Lading. In the letter dated 8th September 1994 from Defendant No. 3 to Defendant No. 1, the Bills of Lading mentioned are six. There are also six Bills of Lading annexed to the Affidavit in Lieu of Examination-in-Chief filed by Mr. Shantilal Liladhar Shah on behalf of the Plaintiff on 10th July 2014. The numbers of these Bills of Lading in each of the three documents are as below, with matching numbers placed in the same row:

Sr. No.	Letter dated 9th July 1994	Letter dated 8th September 1994	Annexures to Mr. Shah's Affidavit
1	TFEI AAM 310487348	TFEI AAM 310487348	TFEI AAM 310487348 (Ex. P-28)
2	TFEI SBZ 408487567	TFEI SBZ 408487567	TFEI SBZ 408487578 (Ex. P-9)
3	TFEI ARI 310487532	TFEI ARI 310487533	TFEI ARI 310487533 (Ex. P-14)
4	TFEI ABM 312487769		
5	TFEI ABM 404488109		
6	TFEI ABM 310487483	TFEI ABM 310487483	TFEI ABM 310487483 (Ex. P-24)
7	TFEI AAM 402487979	TFEI AAM 402487979	TFEI AAM 402487979 (Ex. P-32)
8		TFEI AMB 310487482	TFEI ABM 310487482 (Ex. P-19)

There are therefore five Bills of Lading that remain consistent throughout, with what is, given the additional information about Container Number, likely a typographical error in Sr. No. 3 in the letter dated 9th July 1994 from Defendant No. 1. But the Bills of Lading at Sr. Nos. 4 and 5 in the letter dated 9th July 1994 are not mentioned in the letter dated 8th September 1994 from Defendant

No. 3, and are not annexed to Mr. Shah's Affidavit. Instead, one Bill of Lading numbered TFEI AMB 310487482 is included. The correspondence that ensues either does not specify the details of the shipments or refers to them by invoice number, save and except for the letter dated 4th December 1995 from Defendant No. 3 to Defendant No. 1,[9] in which Defendant No. 3 states that it is holding three Bills of Lading, one of which is at Sr. No. 8 above. Since this point has not been raised, I will assume that these discrepancies are the result of insignificant errors and are not the subject of any dispute, and that we are dealing with the Bills of Lading at Sr. Nos. 1-3 and 6-8 above. These are also the six mentioned in the Affidavit of Mr. Shah at Paragraph 7, although the Plaint, instead of the Bill of Lading at Sr. No. 2 above, refers to the number "408487667" in Paragraph 2.

Re: Issue No. 1

11. The issue of limitation is raised in Defendant No. 1's Written Statement, filed on 26th June 2006.

12. The Indian Carriage of Goods by Sea Act, 1925, as its Preamble makes clear, was enacted pursuant to the "International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading" as a result of the International Conference on Maritime Law held at Brussels in October 1922, known as the "Hague Rules". Schedule 1 lays down rules relating to Bills of

[9] Exhibit P-52

Lading, and within it, Article III contains the responsibilities and liabilities of a carrier. Section 6 provides as follows:

> 6. Unless notice of loss or damages and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.
>
> The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.
>
> **In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless the suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.**
>
> In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(Emphasis supplied)

Thus, in order to hold a carrier liable for any loss or damage, the suit must be brought within one year of the date of the delivery of the goods or, in the case of non-delivery, on the date on which the goods should have been delivered. The dates on the Bills of Lading range from 4th September 1993 to 25th January 1994. Five of the six consignments, according to the information furnished by Defendant No. 1 in its letter dated 9th July 1994, were released between December 1993 and April 1994. However, the letter dated 1st December 1994 from the Plaintiff's Advocates to Defendant No. 1 states that Defendant No. 1 informed Defendant No. 3 that all of the goods were released between 11th November 1993 and 10th December 1993. Another letter dated 13th March 1995 from the advocates for P&O Containers Limited, the 1st Defendant's principal, to Defendant No. 2,[10] records a confirmation by Defendant No. 2 in a meeting that it received five containers at the end of 1993. There seems to be some confusion about the final date of release of the last container, but the discrepancy is too large to be effected by a few months. Even if we assume that the last date was some time later than 13th April 1994, the suit still ought to have been filed in 1995. It was filed much later, on 16th April 1998. It is therefore barred by limitation. The same view was taken by the Supreme Court in the cases of *The East & West Steamship Company, George Town, Madras v S. K. Ramalingam Chettiar*,[11] cited by Mr. Ramabhadran, learned Senior Counsel for the 1st Defendant, and *American Export Isbrandtsen Lines Inc. & Anr. v Joe Lopez and Anr.*[12] This Court also reiterated this view in a recent judgment in *Jotindra Steel & Tubes Ltd. v M. V. Khalijia.*[13] The Supreme Court in *American Export* explicitly states:

10 Exhibit P-43

11 AIR 1960 SC 1058

12 AIR 1972 SC 1405 : (1973) 2 SCC 30

13 MANU/MH/1150/2014

> "Carrier and ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of goods or date when goods should have been delivered."

Section 6, then, does not permit any latitude. However, even if we assume that the Plaintiff was unaware of the failure of Defendant No. 1 to deliver the goods against original Bills of Lading until the letter dated 25th January 1995 in which Defendant No. 1 informed the Plaintiff of this, and of the alleged bank guarantee against which the goods were released, the suit ought to have been filed prior to 25th January 1996 or, if we apply the provisions of the Limitation Act, 1963, by 25th January 1998; i.e., within three years of the accrual of the cause of action. This was not done. The suit is therefore clearly barred by limitation.

Re: Issue No. 3

13. I find the circumstances of the alleged oral contract between the Plaintiff and Defendant No. 2 for the export of the cotton garments most peculiar. The Plaint, filed on 16th April 1998, makes no mention of the oral nature of the contract. In Paragraph 2, it is simply stated:

> "In the month of July/August, 1993 the Plaintiffs entered into a Contract with Defendant No. 2 for export of 6 consignments of Indian 100% cotton garments."

The oral nature of the supposed contract only comes on record in Mr. Shah's Affidavit, filed on 10th July 2014. In Paragraph 4 of his Affidavit, he explains that he met Mr. Prajyot Prasanna Kumar

Lunavat, the owner of Defendant No. 2, in 1988. Initially, Mr. Lunavat would place small orders for the garments, and the Plaintiff would raise invoices upon Defendant No. 2. There was no written contract executed and "business was done based on trust." In Paragraph 5, Mr. Shah admits that since a considerable amount of time has passed since the entering into of the contract, he does not remember its exact date. He states that in or about the second week of July, Mr. Lunavat placed an oral contract with the Plaintiff for the purchase of approximately 45,954 garment pieces, a larger quantity than normal. They allegedly agreed that:

> "payment of 100% invoice value would be made at sight at the seller's bank on presentation of on board Bill of Lading to order of Banco Del Caribe."

Pursuant to this, the Plaintiff raised seven invoices upon Defendant No. 2: JI/055 dated 15th October 1993; JI/056 dated 15th October 1993; JI/052 dated 9th October 1993; JI/049 dated 24th September 1993; JI/048 dated 24th September 1993; JI/043 dated 26th August 1993 and JI/068 dated 17th January 1994. These are annexed to the Affidavit.[14]

14. While the circumstances are unusual, especially given that we do not have any evidence from Defendant No. 2, the existence of the contract was not called into question in the pleadings. Defendant No. 1 simply states, in Paragraph 10 of its Written Statement, that it is not aware of the contract between the Plaintiff and Defendant No. 2. Defendant No. 3 in Paragraph 9 of its Written Statement merely states, in regard to the contract, that the contents of Paragraph 2 of

[14] Marked as Exhibits P-3, P-6, P-11, P-16, P-21, P-26 and P-30

the Plaint are a matter of record. All parties concerned seem to have acted on the understanding that a contract did in fact exist between Defendant No. 2 and the Plaintiff. The letter dated 13th March 1995[15] from the advocates of P&O Containers Limited, Sea Law Consultores, to Defendant No. 2, recorded a meeting held between one Mr. Claus Peter Moeller of Venezolana de Supervisiones Y Ajustes Y Reconocimientos, S.A. ("**Venezolana de Supervisiones**") and Defendant No. 2 on 9th March 1995. During this meeting, the letter states, Defendant No. 2 allegedly confirmed the receipt of five containers[16] from Bombay and admitted to owing the sum of US$ 84,705,13, out of which only US$ 17,000 had been paid. Defendant No. 2 allegedly agreed to pay the balance US$ 67,706,13 plus accrued interest.

15. This is also recorded, with a detailed payment schedule, in the letter dated 27th March 1995 from Venezolana de Supervisiones to Defendant No. 3.[17] In this letter, Venezolana de Supervisiones states that Defendant No. 2 has already made arrangements to pay US$ 7,420 to Defendant No. 3 through Ocean Commercial Bank, Caracas. In a letter dated 1st December 1995[18] from Defendant No. 3 to Venezolana de Supervisiones, Defendant No. 3 refers to a letter dated 21st July 1995 (not on record) whereby Venezolana de Supervisiones confirmed the payment of US$ 10,000 on 13th July 1995 and an additional payment of US$ 7,000 made subsequently. Defendant No. 3 states that it has received the initial payment of

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15 Exhibit P-43

16 It is not explained why this letter refers to five containers instead of six.

17 Exhibit P-44

18 Exhibit P-51

US$ 10,000 but has not yet received the payment of US$ 7,000. It states:

> "We request you to use your good offices and pursue the drawees of the bill to pay the balance amount without any further delay."

The receipt of an amount of US$ 10,000 pursuant to the consignments sent from the Plaintiff to Defendant No. 2 shows, I think, the existence of a contractual arrangement between the Plaintiff and Defendant No. 2. If this did not exist, Defendant No. 3 would not have received any payments. In Mr. Shah's cross-examination, it is put to him in Q. 25 that the Plaint does not mention an oral contract between the Plaintiff and Defendant No. 2; he is excused from answering when Ms. Taneja, the learned counsel for the Plaintiff, accepts that there is no specific mention of it.

16. In the circumstances, the Plaintiff must be held to have established that it had a contract with the 2nd Defendant. It is, I think, most unusual that this should have been oral. In any case, the existence of this contract or arrangement between the Plaintiff and the 2nd Defendant does nothing to help the Plaintiff's case against the 1st Defendant. To the contrary: it only serves to further establish that its cause of action, if any, is against the party from whom the amounts were due and payable, namely, Defendant No. 2. Issue No. 3 is therefore answered in the affirmative.

Re: Issue Nos. 2, 5 and 6

17. Issue Nos. 2, 5 and 6 all relate to the liability of the 1st Defendant. Issue No. 2 is whether or not the Plaintiff has a cause of action against Defendant No. 1. Issue No. 6 is whether Defendant No. 1 proves that it discharged its obligations in terms of the Bills of Lading. Issue No. 5 is whether the Plaintiff proves that Defendant No. 2 was to receive delivery of the goods only upon making payment to their bankers, which is, therefore, related to whether or not Defendant No. 1 should have delivered the goods in the manner in which they did; i.e., not against the Bills of Lading. I therefore propose to consider all of them together.

18. Issue No. 2 refers to specific paragraphs in Defendant No. 1's Written Statement, reproduced below:

> "6) The first Defendant had issued the Bills of Lading as agents of "P & O Nedlloyd". As agents of P & O Nedlloyd the first Defendant has no liability in law or otherwise. The suit is therefore liable to be dismissed.
>
> 7) Without prejudice the first Defendants submit that any claim against the first Defendants could only be by the person who holds the original Bills of Lading. From the correspondence it appears that the original Bills of Lading continued to be held by the third Defendants. The Plaintiffs have thus no legal right to sue these Defendants since they do not possess the original Bills of Lading.
>
> 8) Without prejudice the first Defendants submit that the goods representing 5 Bills of Lading were delivered to the Customs Authorities at Venezuela on or about 8th December 1993. Upon delivering the goods to Customs authorities in consonance with the practice prevailing at

> the Port of Venezuela, the obligation of the principals of the first Defendant ceased as much as the goods in question have been discharged. The first Defendants would crave leave to refer to and rely upon the documents evidencing that the containers in question were delivered to the Customs authorities. The Plaintiffs have thus no cause of action against these Defendants."

19. Paragraph 7 of Defendant No. 1's Written Statement alleges that the suit could only be brought by the person holding the original Bills of Lading, and that as the Plaintiff does not possess them, they have no right to sue Defendant No. 1. This was certainly true at the time of the suit, and, too, at the time of the Written Statement. It makes no difference if, thereafter, the Plaintiff has come into possession of these documents. The issue is whether the suit, as filed, could have been brought on the date of the filing, and the answer must clearly be against the Plaintiff.

20. Paragraph 6 of the Written Statement makes the argument that as Defendant No. 1 is merely an agent of P&O Nedlloyd (then P&O Containers Limited), on whose behalf they issued the Bills of Lading, they cannot be held liable in law by the Plaintiff. This is correct. Each Bill of Lading is issued under the heading of "P&O Containers Limited". In the bottom left-hand corner, each Bill of Lading is signed by Defendant No. 1, then P&O (Indian Agencies) Pvt. Ltd., next to the endorsement "For the Carrier" and above the specific label of "As Agent(s) only". On the back of each Bill of Lading, which contains the Terms and Conditions, under Clause 1: Definitions, "Carrier" is defined as meaning P&O Containers Limited, and "Merchant" is defined as including "the Shipper,

Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession or the Goods or of this Bill of Lading and anyone acting on behalf of any such Person." "Person" in turn is defined as including "an individual, group, company or other entity." Now, Clause 4: 'Sub-Contracting and Indemnity" states:

> (1) The Carrier shall be entitled to sub-contract the Carriage on any terms whatsoever.
>
> (2) **The Merchant undertakes that no claim or allegation shall be made against any Person whomsoever by whom the Carriage is performed or undertaken including all Sub-Contractors of the Carrier, other than the Carrier, which imposes or attempts to impose upon any such Person, or any vessel owned by any such Person, any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising out of negligence on the part of such Person and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.** Without prejudice to the foregoing every such Person shall have the benefit of every right, defence, limitation and liberty of whatsoever nature herein contained or otherwise available to the Carrier as if such provisions were expressly for his benefit, and in entering into this contract, the Carrier, to the extent of these provisions, does so not only on his own behalf but also as agent and trustee for such Persons."

(Emphasis supplied)

Clearly, Defendant No. 1, as the agent of P&O Containers Limited, cannot be held liable for any loss or damage incurred in the course of the delivery of the goods to Defendant No. 2. The Plaintiff was obligated to bring a suit against its principal, the party in whose name and on whose behalf the Bills of Lading were issued; viz., P&O Containers Limited. This is evident in the Terms and Conditions of the Bills of Lading themselves, as well as being, I think, a well-settled legal principle. The suit is therefore liable to be dismissed on this ground.

21. As far as regards the allegations made in Paragraph 8, I will assume that the suit was brought within time and that it was brought against the principal, P&O Containers Ltd. Would the Plaintiff have a cause of action even then? On the front of each Bill of Lading in the left-hand bottom corner is written: "One original Bill of Lading, duly endorsed, must be surrendered in exchange for the Goods." Since the Bill of Lading forms the basis of the contractual arrangement between the Plaintiff and Defendant No. 1, the failure to insist upon delivery of the goods only upon the presentation of an original Bill of Lading by Defendant No. 2 may be a violation of it. The goods were instead admittedly delivered to the Venezuelan Customs Authority, as informed by Defendant No. 1 in its letter dated 25th January 1995 to Defendant No. 3, in which it also refers to Banco Del Caribe providing a guarantee to the Customs Authority. Banco Del Caribe then alleges in a letter dated 10th April 1995[19] that they never furnished any guarantee in favour of the Administrator of Customs. This is certainly suspicious. But the suspicion, I think, falls upon Defendant No. 2, not Defendant No. 1.

[19] Exhibit P-45

22. It is undisputed that Defendant No. 1 delivered all of the goods to Defendant No. 2. Irrespective of how that delivery was effected, through what authority, and in exchange for what documentation, Defendant No. 2 is at this moment in possession of the goods, and, indeed, was admittedly put in possession back in 1993-1994. The Plaintiff's loss and claim for damages, if any, stems from the refusal of Defendant No. 2 to remit the amounts due, not from any failure or negligence on Defendant No. 1's part to deliver the goods. This becomes clear from the correspondence. As mentioned previously, the letter dated 13th March 1995 records a meeting between Venezolana de Supervisiones and Defendant No. 2, in which Defendant No. 2 confirmed the delivery of five containers and allegedly admitted its liability of US$ 67,705,40, with interest. In its letter dated 27th March 1995 to Defendant No. 3, Venezolana de Supervisiones forwarded a payment schedule to Defendant No. 3, and stated that Defendant No. 2 had already made arrangements to pay a sum of US$ 17,420. It made specific reference to the 2nd Defendant's liability and in fact berated its conduct:

> "We are aware of the fact that Eximplus has no right at this stage of the case to ask for credit and/or partial payments, but considering the actually poor situation of the local market in Venezuela, running with approximately 6% of inflation per month and increasing, with a drunken demand for the most necessary matters for living and with migration of old, settled enterprises to foreign countries with a better standard of living, we must be happy when Eximplus is accomplishing with what was already agreed upon; it could have been worse."

It therefore seems that Defendant No. 1 was in fact then attempting to help the Plaintiff recover its dues from Defendant No. 2. Today, the Plaintiff seeks to saddle the 1st Defendant with that very liability. Defendant No. 3 confirmed, in its letter dated 1st December 1995 to Venezolana de Supervisiones, that it received an initial payment of US$10,000. The fact that payments were actually received pursuant to an understanding arrived at between Venezolana de Supervisiones and the 2nd Defendant makes it clear that Defendant No. 2 was and is aware of its liability, and simply failed or refused to pay. This is further substantiated by the letter dated 10th April 1995 from Banco Del Caribe to Defendant No. 3, in which Banco Del Caribe in no uncertain terms confirms the 2nd Defendant's refusal to put it in funds and in fact accuses the Customs Authority of complicity in the fraud concerning the bank guarantee:

> With reference to your letter dated March 15, 1995, **regarding bills suit to us for collection which were returned to you because they were unpaid by the drawees EXIMPLUS REPRESENTACIONES, C.A.,** we hereby inform you that the following original documents, were returned to you due to they were unpaid: P-1953 18/93, P-1953 20/93, P-1953 30/93 & P-1950 45/94.[20]
>
> Please be informed that we have never relinquished any rights of your khand Bazar Branch instructions because **we never gave a guarantee letter dated 12-11-93 in favour of the local Administrator of Customs, as mentioned in our letter.**

[20] Again, there is no explanation as to why only four documents are referred to here. However, in the context of what I hold in the rest of the judgment, it is not necessary to examine this in detail.

> **By the way we were informed by Mr. Claus Peter Moeller M., Representative of VENEZOLANA DE SUPERVISION Y AJUSTES Y RECONOCIMIENTOS, that Mr. Zapata, custom broker, of EXIMPLUS REPRESENTACIONES, C.A., utilized a photocopy and modified the data to withdraw the merchandise from customs, but according to the custom law, this procedure should be done with the original document, therefore, we assume there was a complicity with the custom authorities.**
>
> We regret for any inconvenience caused in this matter and we are going to take the necessary actions regarding the fraud guarantee was forged by the local Administrator of Customs."

(Emphasis supplied)

The Plaintiff's reliefs are for the outstanding sum, plus interest, amounting to Rs. 53,28,687, and for damages amounting to Rs. 2,48,00,000. At the cost of repetition, the relief pertaining to the outstanding sum is evidently only maintainable against Defendant No. 2; Defendant No. 1 cannot possibly bear any contractual liability for the outstanding amounts payable on the invoices, especially given that Defendant No. 2 has made some payments pursuant to them. As far as regards the Plaintiff's claim for damages, I think that it, too, is maintainable only against Defendant No. 2, and not against Defendant No. 1. There is no nexus between Defendant No. 1's conduct and the loss that the Plaintiff may have suffered, for which it seeks damages. There is no evidence to suggest that had Defendant No. 1 insisted on effecting delivery against the original

Bills of Lading, the Plaintiff would have received its dues, because, as borne out by Banco Del Caribe's letter, Defendant No. 2 had not even put Banco Del Caribe in funds. The Plaintiff produces no correspondence between Banco Del Caribe and Defendant No. 3 to show that had Defendant No. 1 insisted on delivery as against the Bills of Lading, Defendant No. 2 would have made the requisite payments. In fact, it is clear that Defendant No. 2 was required to put Banco Del Caribe in funds and obtain the Bills of Lading before delivery by Defendant No. 1; their refusal to do so is prior in time and therefore (in the absence of any evidence to the contrary) independent of Defendant No. 1's conduct. The Plaintiff also fails to produce any evidence concerning its contract with Defendant No. 2 to establish such a nexus. The Plaintiff's cause of action is thus only against Defendant No. 2, who has already acknowledged its liability by making payments to Defendant No. 3 and, it seems, in meetings held with Venezolana de Supervisiones. It is not and cannot be against Defendant No. 1. The suit, therefore, as alleged in Paragraph 8 of the Written Statement, is liable to be dismissed.

23. I must note that there is no adequate reason given why the Plaintiff was unable to proceed against the 2nd Defendant. If it could ship goods to the 2nd Defendant and these were delivered, there ought to have been no difficulty, and perhaps nothing more than some expenditure incurred, in effecting service. The fact that the Plaintiff chose not to press its claim against its principal debtor, one that had made part payment and also acknowledged liability, is a strong circumstance militating against the acceptance of the Plaintiff's first claim against the 1st Defendant for recovery of the balance of its invoice value.

24. A word in brief on Issue Nos. 5 and 6 here, which raise a related but distinct issue of whether or not Defendant No. 1 can be held liable for negligence. With regard to Issue No. 5, if the Plaintiff proves that Defendant No. 2 was to receive delivery only upon making payment to their bankers, this has consequences for Defendant No. 1; it implies that Defendant No. 1 was negligent in delivering the goods without obtaining the original Bills of Lading. Issue No. 6 is whether Defendant No. 1 proves that it had discharged its obligations in terms of the Bills of Lading; if delivery was to be effected only upon production of an endorsed and original Bill of Lading, then Defendant No. 1 may be liable for negligence. We have seen that the Terms and Conditions of the Bills of Lading required that delivery was to be effected upon presentation of a duly endorsed original Bill of Lading. Admittedly, this was not done. Instead, the goods, supposedly in accordance with the practice at Venezuela, were delivered to the Customs Authority. The Plaintiff's second claim is for damages on account of the alleged negligence of Defendant No. 1. This, unlike its other claims, is directed against the correct party and is, in that regard, maintainable. But there is no evidence led of previous transactions or shipments in the history between the Plaintiff and Defendant No. 1 or how these were normally done, apart from Paragraph 4 in Mr. Shah's Affidavit, which annexes no documentary evidence whatsoever.

25. In any case, I find it unnecessary to go into these issues in further detail, as Issue Nos. 5 and 6 do not survive; irrespective of whether or not the Plaintiff establishes a failure to discharge obligations or negligence, for the reasons previously discussed, it cannot claim any reliefs from Defendant No. 1. The Plaintiff is still

unable to establish any nexus between the negligence of Defendant No. 1, if any, and the losses that it suffered, which run into loss of business, loss of the credit facility extended by Defendant No. 3, etc. There must be such causality, in law, to claim damages, and the Plaintiff led no such evidence.

26. In summary, Issue No. 2 is answered overall in the positive; the suit is liable to be dismissed for want of cause of action as alleged by Defendant No. 1.

Re: Issue Nos. 4, 7 and 9

27. Issue No. 4 is whether the Plaintiff proves the value of the Bills of Lading. Issue No. 7 is whether the Plaintiff proves that the bank guarantee furnished by Defendant No. 2 to the Customs Authority was forged. It is worth pointing out that, apart from Banco Del Caribe's letter dated 10th April 1995, we have no evidence in this regard. Issue No. 9 is whether the Plaintiff proves that it has suffered loss in the amount of Rs. 2,48,00,000 or any part thereof towards damages. There is no proof of any such damages, and none that can be related to any conduct of the 1st Defendant.

Re: Issue Nos. 8 and 10

28. In the context of my answers to Issue Nos. 1 and 2, Issue Nos. 8 and 10 must be answered in the negative. Defendant No. 1 is not liable to pay a sum of US$ 41,209, because the Plaintiff has no cause

of action against Defendant No. 1. The Plaintiff is, therefore, not entitled to any interest, either.

Re: Issue No. 11

29. The suit is dismissed, with no order as to costs.

(G.S. PATEL, J.)