IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.1 of 2017

1. M/s. Sidereal Agencies
Having its office at H.No.299,
Near Maruti Temple,
Headland Sada, Mormugao,
Goa, represented herein by
its partners.

2. Mr. Damodar S. Divkar
s/o Sadashiv Divkar,
aged 40 years,
r/o H.No.200,
Near Maruti Temple,
Headland Sada,
Mormugao, Goa.

3. Mr. Vikram P Nayak
s/o Pandurang Nayak,
aged 35 years,
r/o near Nayak Building,
Baina, Vasco-da-Gama .. Appellants

V/s

The Board of Trustees
of Mormugao Port,
Administrative Office,
Headland Sada,
Mormugao, Goa. .. Respondent

Mr. R. Menezes, Advocate for the appellants.

Mr. Bhargav Khandeparkar, Advocate for the respondent.

CORAM :- **C. V. BHADANG, J.**

Date : 20th June, 2017

ORAL ORDER :

The appellants, who are the original plaintiffs, are challenging the concurrent finding of dismissal of their suit, seeking damages.

2. The brief facts may be stated thus :

On 30/06/2012, the respondent Mormugao Port Trust (MPT) had floated a tender, inviting bids for allotment of open space inside the Mormugao Wharf area of breakwater berth of MPT, for setting up Shamiana stalls in 18 square metres area each, for selling handicrafts, carpet items, etc. for the fair season from October, 2012 to May, 2013. The appellants had applied for allotment of 18 square metres of land, which they were eventually allotted as per the letter of acceptance dated 06/09/2012. The material condition of the tender/ allotment was that the allottee would be bound to abide by the provisions of Customs Act and Regulations, as the area inside the Wharf was customs bound/ notified area. The other condition was that the sale and money transaction should be as per the relevant law and permission/ sanction from the appropriate authority, if any required, should be obtained by the licencee/ allotee. In other words, as per the material conditions of the tender, the prospective applicants were put on notice that the area, which was to be allotted, was part of the customs bound/ notified area and it was the licencee, who was to obtain the necessary permissions from the customs authorities as well as Reserve Bank of India (RBI).

3. The allotment was succeeded by an agreement executed between the parties on 11/09/2012, in which vide clause (2), it was one of the conditions that all statutory requirements, including taxes and other obligations of the business, shall be complied/ fulfilled by the licencee and the MPT shall not be liable / responsible for the same in any manner whatsoever.

4. It appears that the appellants applied to Customs Authority on 16/11/2012, seeking, permission for installation of Shamiana stalls. On 29/11/2012, the Assistant Commissioner of Customs refused to grant permission for the following reasons :

> *"With reference to your letter on the above subject, the matter has been examined and it is observed that :*
> *1. The Commissioner of Customs & Central Excise, Goa, in exercise of powers conferred under Section 8 of the Customs Act, 1962, has approved the area of renovated breakwater for loading/ unloading of goods, storage and operational storage of cargo vide Notification No.2/2012 dated 15/10/2012.*

2. However, no area has been marked for installation of Shamiana Stalls or for conducting any sale activities on the said Berth vide said Notification.
3. Besides this, from your letter, it does not appear that your firm is a holder of licence of Authorised Dealer for Foreign Exchange from RBI.
In the light of above your request for the permission for setting up of Shamiana Stall cannot be acceded to.”

5. Indisputably, the appellants have not shown that they had either applied or were granted requisite permission from the RBI.

6. In the year 2015, the appellants filed a suit against the respondent seeking damages of Rs.10 Lakhs along with interest on account of breach of contract by the MPT. The case made out in the plaint is that the appellants had made an attempt to sort out the matter and had written to the MPT. However, the appellants were informed by the letter dated 06/12/2012 by the Traffic Manager that as per the tender conditions, it was for the appellants to obtain necessary permissions. In short, the case made out by the appellants is that the MPT misrepresented the appellants as to the area being a customs bound/ notified area and without obtaining the necessary clearance from the customs

authority, invited tenders. According to the appellants, the cause of action arose on 06/09/2012, when the respondent received the letter of acceptance and again on 11/09/2012, when the respondent executed Agreement of Licence. The cause of action in the plaint is shown to have lastly accrued on 06/12/2012, when the appellants received letter from the Traffic Manager.

7. Before the Trial Court, the appellants examined Ms. Juliet Fernandes (PW5) being the Superintendent of Customs, who stated that as per the notification at Exhibit 28, the MPT could not allow any other person to set up stalls for selling handicrafts and carpets in the approved area and separate permission was required to be obtained from the office of the Customs to set up such stalls in the said area. She also claimed that such permission was to be obtained by the respondent MPT.

8. On behalf of the appellants, strong reliance is placed on the evidence of PW5, in order to contend that it was the responsibility of the respondent to obtain the permission and the respondent, without obtaining such permission, had gone ahead for demarcating the area and even proceeded for floating the tender for allotment. This, according to the appellants, amounts to breach of contract, entitling the appellants to compensation.

9. The Trial Court answered issue no.1 in the affirmative holding that it was incumbent upon the respondent to get the area marked by the Customs Authorities, before inviting tender. At the same time, the Trial Court answered issue no.2 partly in the affirmative and partly in the negative. The trial Court did not accept that the respondent MPT had failed to disclose to the appellants that the area was customs bound area. In short, the Trial Court refused to accept that there was any misrepresentation by the respondent.

10. The First Appellate Court framed the following points, which were answered in the negative :

> *"1 Whether the trial Court has arrived at a wrong conclusion as regards to second part of issue no.2 by arriving at a contrary finding in view of the findings given in issue no.1?*
> *2 Whether the trial Court misunderstood and misinterpreted the evidence in coming to a wrong conclusion as regards to issue no 5?*
> *3 Whether the trial Court misapplied the provisions of Foreign Exchange Management Act?*
> *4. Whether the trial Court erred in answering issue no.3 in the negative in spite of sufficient material on record ?"*

Resultantly, the appeal was dismissed. Hence, this Second Appeal.

11. I have heard Shri Menezes, the learned Counsel for the appellants and Shri Khandeparkar, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

12. It is contended by Shri Menezes, the learned Counsel for the appellants that it was the responsibility of the respondent to obtain clearance from the Customs Authorities. It is submitted that without obtaining such clearance, the area could not have been demarcated. It is submitted that the appellants were never put on notice that it was for the appellants to obtain necessary permission. It is submitted that the respondent did not lead any evidence and as such, the Courts below were in error in accepting the defence of the respondent. Alternatively, it is submitted that there was no express notice that it was for the respondent to obtain the permission.

13. On the contrary, it is submitted by Shri Khandeparkar, the learned Counsel for the respondent that the tender conditions and the clauses of the agreement are explicit to show that the

prospective applicants and the allottees were put on notice that it is for them to obtain necessary permission and there is no misrepresentation. It is submitted that the entire evidence is of a documentary nature and as such, the non-examination of any witness by the respondent, would have no consequence, as has been rightly held by the Courts below.

14. I have carefully considered rival circumstances and submissions made and I do not find that the appeal raises any substantial questions of law.

15. Condition nos.9(ii) and 21 of Conditions of Tender read as under :

> *"9. The successful bidders are required to comply with the following in the stalls.*
> *(I) ....*
> *(II) The sales and money transaction should be as per relevant law and permission/ sanction from the appropriate authority if any required, should be obtained by the licensee.*
> *21. The area inside the wharf is Customs bound/ notified area. Hence licensee is bound to abide the provisions of Customs Act and Regulations."*

16. Clause (2) of the Agreement executed between the

parties reads as under :

> *"All statutory requirements including taxes and the other obligations of the business shall be complied/ fulfilled by the licensee and also the taxes, fees, statutory levies and other financial obligations imposed on / attracted by the business shall be borne by the Licensee without failing and the Mormugao Port Trust not be liable/ responsible for the same in any manner whatsoever."*

It can, thus clearly, be seen that the appellants were put on express notice that it is for the licencee to comply with the relevant law and obtain permissions and sanctions from the appropriate authorities, if any required. In clause (2) of the Agreement, similar condition was reiterated, while making it clear that in case of failure of licencee to obtain any such permission, the respondent shall not be liable or responsible in any manner.

17. Coming to the evidence of PW5, although in the Chief-examination, the witness has stated that it was for the respondent to obtain necessary permission, in the cross-examination, the witness has made it clear that any person, who wants to do any activity in the approved area, has to seek permission from the customs. In my considered view, there can be two situations, which can arise in respect of such permission. The respondent

can obtain general permission from the customs authorities, permitting such business to be carried on in the entire demarcated area or leave it to the prospective allottes/ licencee, who can obtain such permission before they can start the business in the allotted area. As noticed earlier, the conditions of tender and the agreement are clear enough to come to the conclusion that the appellants were put on notice and were aware that it is for them to obtain necessary permissions. The appellants, having subjected to the conditions of tender and having entered into the contract, cannot now be permitted to derogate from the same. The entire basis of the claim is of the alleged breach of contract and/ or misrepresentation by the appellants, none of which, can be gathered from the record. The cause of action, as shown in the plaint, neither arises on the allotment letter being issued or the contract being signed, nor when the respondent had allegedly issued letter dated 06/12/2012, by which, at the highest, the respondent had made their earlier stand clear that the responsibility to obtain permission was on the appellant.

18. Similarly, non-examination of any witness by the respondent would be inconsequential in this case, as the evidence about the term and conditions of the tender and allotment was documentary in nature. Furthermore, the burden to establish that

there was any misrepresentation and/ or breach of the contract lay on the appellant.

19. For these reasons, no exception can be taken to the concurrent findings recorded by the Courts below. In the result, the Second Appeal is dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA