

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 417 OF 2015

Allcargo Logistics Ltd.
Formerly known as (Allcargo Movers
(India) Pvt. Ltd. A company incorporated
in India under the Companies Act, 1956,
having its office at 6th floor, Avashya
House, CST Road, Kalina, Santacruz
(East), Mumbai 400 098

...Appellant

Versus

1. Dhanesh B. Jain
an adult, Indian Inhabitant, carrying on
business as sole proprietor in the name
and style of Mahavir Apparels at and
from 304, 404, Abhijeet Building,
Mithakhali Six Roads, Ahmedabad 380
006, Gujarat, India (Ori. Plaintiff)
2. M/s. Walford Meadows Ltd.
a company incorporated under Foreign
Laws having his office at 1st American
Bank Building, 2nd Floor, Moi Avenue,
Mombassa (Ori.Def.No.4)
3. ACE Lines
a company incorporated under Foreign
Laws having its office at 29 Bis Mere
Bathelemy Street, Port Louis, Mauritius (Ori.Def.No.1)
4. Allcargo Container Lines Ltd.
a company incorporated under Foreign
Laws having its office at 29 Bis Mere
Bathelemy Street, Port Louis, Mauritius (Ori.Def.No.2)

...Respondents

Mr. Rajesh Shah, a/w Nirav Barot, i/b Maneksha and Sethna,
for the Appellant.

Ms. Hiral Thakkar, a/w Naresh Ratnani, i/b Ashwin Ankhad
& Asso., for Respondent no.1.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 8th APRIL, 2022
PRONOUNCED ON: 28th SEPTEMBER, 2022

JUDGMENT:-

1. This appeal is directed against a judgment and decree dated 18th October, 2014, passed by the learned Judge, City Civil Court, Bombay in SC Suit No.7175 of 1997 (the High Court Suit No.1861 of 1997).
2. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they were arrayed before the trial Court.
3. Respondent no.1 (plaintiff) is a proprietary concern. It was engaged in the business of apparels. Respondent no.3 (defendant no.1) is an entity operated by respondent no.4 (defendant no.2), Allcargo Container Lines Ltd., a company registered under foreign laws. Appellant (defendant no.3) Allcargo Logistics Limited (Formerly known as Allcargo Movers (India) Pvt. Ltd.), is a company incorporated under the Companies Act, 1956. Respondent no.2 M/s. Walford Meadows Ltd. (defendant no.4) was the agent of defendant nos.1 to 3. The plaintiff asserted that defendant nos.1 to 3 are

interrelated/sister companies and/or belong to and/or managed by the same group of companies.

4. In or about July, 1996, the plaintiff entered into contracts with M/s. Universal Apparel (EPZ) Ltd. Kenya ("M/s. Universal") for the sale of Cotton Knitted fabrics and other allied accessories valued US\$ 98,715.29. The plaintiff entrusted the goods to defendant nos.1 to 3 for carriage and delivery, from the Port of Bombay to Mombassa. Defendant no.3 issued six Bills of Lading. Each of those six Bills of Lading were made out, "TO ORDER" signifying that the delivery of the six consignments shipped thereunder was to be given only upon production and surrender of the original Bills of Lading to the defendants.

5. The ships carrying the consignments arrived at the Port of Mombassa. The plaintiff learnt that, in breach of express condition of the delivery of the consignments only upon production of the original Bills of Lading, two consignments shipped through "CMBT TANA" and "CMBT KILIMANJARO" were delivered to the consignee without production of the Bills of Lading. The plaintiff immediately called upon defendant no.3 to look into the matter and make amends as the delivery was effected in breach of express term of the Bills of Lading. The plaintiffs were given to understand that two of the rest of the

consignments were under clearance. Defendant no.3 instructed defendant no.4, its agent at Mombassa, not to deliver the consignments without production of the original Bills of Lading. The plaintiff lodged a formal claim with defendant no.3 for damages in the sum of US\$ 84,353.00 for wrongful delivery of the goods vide communication dated 14th September, 1996.

6. In the meanwhile, on 19th September, 1996, defendant no.4 addressed a communication to M/s. Universal, the consignee, *inter alia*, confirming that four consignments were delivered to the consignee without presentation of the original Bills of Lading. Thereupon the plaintiff's addressed a legal notice on 30th September, 1996 to the defendant nos.2 to 4 calling upon them to pay a sum of US\$ 1,00,000 being the damages suffered by the plaintiff on account of breach of the terms of contract. The defendants did not apprise the plaintiff about the fate of the rest of the two consignments as well. Thus, the plaintiff was constrained to presume that the rest two consignments were lost. In any event, the goods shipped under rest two consignments were an intergral part of, and complementary to, the four consignments, which were wrongfully delivered and, thus, the goods in the last two consignments had also lost their utility. The plaintiff avers the

defendants took an incorrect stand that the plaintiff had advised M/s. Universal to re-deliver the goods to M/s. Fashionette Industries Ltd.

7. The plaintiff asserts the defendants were duty bound to deliver the consignments covered under the Bills of Lading only upon presentation of the original Bills of Lading under the terms of the contract. However, the defendants committed breach of express term of contract of carriage by wrongfully and illegally delivering the consignments sans presentation of original Bills of Lading. In addition, according to the plaintiff, the defendants have committed breach of duty under the provisions of the Carriage of Goods by the Sea Act and also their duty as bailees. Hence, the plaintiff was constrained to institute the suit for the value of the goods along with interest at the rate of 24% p.a. which became payable, after 90 days from the date of the invoice.

8. M/s. Walford, defendant no.4, did not appear despite service. Hence, the suit proceeded *ex parte* against defendant no.4.

9. Defendant nos.1 and 2 resisted the suit by filing written statement. At the outset the tenability of the suit was assailed

on the ground of misjoinder of the parties on the premise that ACE Lines, defendant no.1, was not a legal entity and just a trade name of defendant no.2. Defendant nos.1 and 2 categorically denied that defendant nos.1 to 3 are interrelated/sister companies and/or belong to and/or managed by the same group of companies. Secondly, it was contended that the Civil Court at Bombay had no territorial jurisdiction to entertain, try and decide the suit qua defendant nos.1 and 2, who were not residing and/or carrying on business within the jurisdiction of the Court. Nor any part of the cause of action accrued within the territorial limits of the Court at Bombay. Thirdly, it was contended that the plaintiff was put to notice by defendant no.3 as early as 9th October, 1996 itself that the plaintiff had agreed to hand over the consignment by M/s. Universal, the original consignee, to Fashionette. Yet, the plaintiff did not controvert the said position. Therefore the said silence constituted an admission of the contents of defendant no.3's letter dated 9th October, 1996. Resultantly, the plaintiff had no cause of action against the defendants. Lastly, the plaintiff suppressed the vital fact that M/s. Universal, the consignee, had rejected the goods and called upon the plaintiff to take back the delivery of those defective goods and yet the

plaintiff failed to take steps to mitigate the loss. Therefore, the plaintiff is not entitled to the value of the goods.

10. Defendant nos.1 and 2 have also contested the value of the goods claimed by the plaintiff. According to defendant nos.1 and 2, the alleged wrongful delivery was of four consignments only. The plaintiff could not have claimed the value of the goods shipped in six consignments. In any event, M/s. Universal, the consignee, had rejected the goods for being of inferior/defective quality. Thereupon, the plaintiff arranged another buyer Fashionette to whom the goods were redelivered by the consignee. Therefore, the plaintiff is not entitled to claim damages.

11. Defendant no.3 also contested the suit by filing written statement. The substance of the resistance put forth by defendant no.3 was that defendant no.3 was an agent of its disclosed principal i.e. defendant no.2. Thus, in view of the provisions contained in Section 230 of the Indian Contract Act, 1872, no liability could be fastened on defendant no.3 for the alleged wrongful act of M/s. Walford, defendant no.4, another agent of defendant no.2 at Mombassa. It was further contended that, on the own showing of the plaintiff, the alleged wrongful delivery was only of four out of six consignments. According to

defendant no.3, the plaintiff is not entitled to raise any claim as regards the value of the balance two consignments. It was denied that the goods in the rest two consignments were rendered useless as they were an integral part of, and complementary to, the goods in the first four consignments. Defendant no.3 contended that the defendants were never put to notice about the said facts and, therefore, the plaintiff cannot claim damages on the said count.

12. Defendant no.3 categorically contended that being an agent of the disclosed principal, defendant no.3 was entrusted with the task of shipping goods at the Mumbai Port. Defendant no.3 had performed the said obligation by duly shipping the goods at Mumbai Port and also specifically instructing the agent of defendant no.2, at the port of discharge, to deliver the consignments only upon the production of original Bills of Lading. Therefore, there was no breach of any contractual or statutory duty on the part of defendant no.3.

13. On the basis of the aforesaid rival pleadings, issues were settled by the City Civil Court. In order to substantiate his case, the plaintiff examined Badarmal Modiram Jain (PW-1) and tendered documents including the Bills of Lading and the copies of the correspondence exchanged between the plaintiff

and defendants, *inter se*, and with M/s. Universal the consignee. In the rebuttal defendant no.3 examined Rajan Randhive (DW-1), the Assistant General Manager of defendant no.3. A number of documents were also tendered on behalf of the defendants.

14. After appraisal of the oral evidence and the documents tendered for his perusal, the learned Judge, City Civil Court, was persuaded to partly decree the suit directing, *inter alia*, defendant nos.1 to 4 jointly and severally pay the amount of US\$ 84,353.31 along with interest at the rate of 24% p.a. from the date of the institution of the suit till realization. The learned Judge was of the view that the City Civil Court had jurisdiction to entertain, try and dispose of the suit; the plaintiff succeeded in establishing that the value of the goods consigned was US\$ 84,353.31 and the defendants were guilty of breach of contract in as much as the goods were delivered to the consignee in violation of the terms of the contract and, therefore, the defendants were liable to pay the damages. Conversely, the learned Judge held, defendant nos.1 and 2 failed to establish that the plaintiff had agreed for re-delivery of the goods by M/s. Universal, the original consignee to another

buyer Fashionette, and defendant no.3 failed to establish that it had acted only as an agent of the disclosed principal.

15. Being aggrieved by and dissatisfied with the impugned decree, appellant - defendant no.3, has preferred this appeal. Rest of the defendants have not assailed the decree.

16. I have heard Mr. Shah, the learned Counsel for the appellant and Ms. Thakkar, the learned Counsel for respondent no.1 – original plaintiff, at length. The learned Counsels have taken me through the pleadings, oral evidence adduced before the Court and the documents filed in support of the rival claims. I have also carefully perused the impugned judgment.

17. At the outset, Mr. Shah, the learned Counsel for the appellant, would urge that though during the course of the trial defendant nos.1 to 3 were represented by the same Advocate, the defence of defendant no.3 is quite distinct from that of defendant nos.1 and 2. The fact that defendant nos.1 and 2 have not assailed the decree would not impinge upon the defence of defendant no.3 as it rests on an established principal of law that being an agent of the disclosed principal defendant no.3 could not have been held liable for the alleged wrongful delivery of the goods by another agent of the disclosed principal

18. Mr. Shah strenuously submitted that the learned Judge, City Civil Court, committed a manifest error in recording a finding that the plaintiff succeeded in establishing the value of the goods despite there being a clear disclaimer in the Bills of Lading that 'the weight, measure, quantity, condition, contents and the value of the goods were unknown to the carrier'. According to Mr. Shah, the learned Judge misdirected himself in construing the communication addressed by defendant no.3 to the consignee M/s. Universal that on the basis of the claim of the plaintiff, defendant no.3 had debited a sum of US\$ 82,353.31 to the account of the consignee. Since there was neither proof of the value of the goods nor anything to indicate that defendant no.3 had debited the said amount in the account of M/s. Universal, the learned Judge could not have answered the said issue in favour of the plaintiff.

19. Mr. Shah further submitted that the trial Court grossly erred in not appreciating the jural relationship between defendant no.3 and defendant no.2, on one part, and defendant no.2 and defendant no.4, on the other part. It was all along the case of defendant no.3 that it was an agent of the disclosed principal. In this view of the matter, even if the case of the plaintiff is taken at par that there was wrongful delivery of the

goods by the agent of defendant no.2, at the port of discharge, defendant no.3 could not have been fastened with any liability.

20. By the impugned judgment, according to Mr. Shah, defendant no.3 is made liable for the wrongful act of another agent of the principal of defendant no.3, sans any vicarious liability, which is legally impermissible. In fact, according to Mr. Shah, defendant no.3 had fully performed its duty by loading the consignments at the Port of Bombay on board the ships named by the principal and issued the Bills of Lading, with specific instructions that the delivery was to be made, "TO ORDER". Moreover, defendant no.3 had addressed communications on 31st August, 1996 and 2nd September, 1996 specifically informing the agent at the Port of discharge to deliver the goods only upon the production of the original Bills of Lading. In the circumstances, neither breach of duty nor negligence could have been attributed to defendant no.3. Therefore, the impugned decree qua defendant no.3 - appellant deserves to be set aside.

21. Mr. Shah would urge that, in any event, as the plaintiff did not make any effort to mitigate the loss despite having been apprised by M/s. Universal that it had rejected the goods, the plaintiff is not entitled to damages. Failure to mitigate the loss,

in the facts and circumstances of the case, according to Mr. Shah, materially impairs the plaintiff's claim for damages.

22. Lastly, Mr. Shah would urge, there is material to indicate that the plaintiff had availed the benefit of duty drawback under Section 75 of the Customs Act. Duty drawback implies that the plaintiff had received entire price of the goods. The learned Judge, City Civil Court, according to Mr. Shah, failed to properly appreciate consequence of duty drawback, which was clearly admitted by PW-1.

23. In opposition to this Ms. Thakkar, the learned Counsel for respondent no.1 – plaintiff, stoutly submitted none of the grounds urged on behalf of defendant no.3 are worthy of consideration. Ms. Thakkar laid emphasis on the fact that the wrongful delivery of the consignments by defendant no.4 to M/s. Universal is borne out by the correspondence exchanged between the defendants *inter se* and with M/s. Universal. It is also indisputable that the plaintiff did not receive the consideration. In the face of these twin facts, the defences sought to be raised by the defendants, especially defendant no.3, are creatures of afterthought. Contemporaneous record, according Ms. Thakker, would indicate that at no point of time defendant no.3 raised any dispute about the fact that defendant

no.3 acted in the capacity of the agent of defendant no.3. On the contrary, there are documents wherein not only defendant no.3 had acknowledged defendant no.4 to be its agent at Mombassa, but even the latter conceded that defendant no.3 was its principal. With a view to extricate itself from the liability, the defendant no.3 has taken a palpably false defence that defendant no.4 was the agent of defendant no.2 and defendant no.3 had no concern with defendant no.4. The said stand defence is clearly belied by the evidence, urged Ms. Thakkar.

24. The endeavour of the defendants to assail the decree on the ground that value of the goods has not been independently proved, according to Ms. Thakkar, also does not merit countenance for reasons more than one. First, there is no material to show that the defendants ever contested the value of the goods, till the written statement came to be filed. Second, defendant no.3 claimed to have debited the account of defendant no.4 with the sum of US\$ 84,000, which the plaintiff had claimed from defendant no.3.

25. Ms. Thakkar further submitted that the challenge to the impugned decree on the ground that the plaintiff took no measures to mitigate the loss is wholly misconceived.

Indisputably, the plaintiff had parted with the goods and was not in a position to exercise any control over the goods. In such a situation, where there is no shred of material which establishes that, M/s. Universal had allegedly rejected the goods, the defence based on failure to mitigate the loss can only be said to be a figment of imagination.

26. On the aspect of the duty drawback, Ms. Thakkar canvassed a two-pronged submission. One, there is no admission, as alleged by defendant no.3, that the plaintiff had in fact received the duty drawback benefit. Even otherwise, there is no prohibition in law to avail duty drawback even if the consideration remains unpaid. In any event, according to Mr. Thakkar, the duty drawback, even if assumed to have been availed of, does not lead to an escapable inference that consideration has been duly received by the plaintiff, which the defendant no.3 wants the Court to believe. In the totality of the circumstances, the impugned decree is impeccable, submitted Ms. Thakkar.

27. I have given anxious consideration to aforementioned rival submissions. In the backdrop of these submissions, the challenge to the impugned decree can be conveniently evaluated in four parts.

(1) Whether the value of the goods consigned by the plaintiff is proved?

(2) Is defendant no.3 liable for wrongful delivery of the goods by defendant no.4 to the consignee?

(3) Whether the plaintiff's alleged failure to mitigate the loss dis-entitles the plaintiff from seeking damages?

(4) What consequences flow from the benefit of duty drawback allegedly availed by the plaintiff?

Point No.1:

28. Before adverting to consider the aforesaid contentious issues it may be apposite to note that upto the point of delivery of goods by defendant no.4 to M/s. Universal, there is no element of controversy between the parties. The fact that the Bills of Lading were made "TO ORDER" is not at all in issue. Nor the fact that defendant no.4 delivered the consignments to the M/s. Universal without production of original Bills of Lading. Wrongful delivery of the goods in breach of express term of the contract is thus indubitable. The controversy between the parties revolves around the consequences which emanate from such wrongful delivery, the party who should suffer the consequences and the effect of the subsequent events, which allegedly occurred.

29. To retain emphasis and narrow down the controversy, it may be expedient to extract the contents of letter dated 19th September, 1996, Exhibit-E-2 addressed by defendant no.4 to the consignee. With reference to the four original Bills of Lading, under which the goods were consigned, defendant no.4 wrote as under;

“The above shipment were released and delivered to you without your surrendering to us the original bills of lading.

The procedure of the through bills of lading or house bills of lading are that no cargo should be released to the importer without presentation of the original bills of lading. However, this favour was extended to you because:-

1. You are our regular customer
2. To save you from heavy port storage charges which you would have incurred if you were to wait until you got the original bill from your supplier.
3. You needed the material very urgently as you were out of stock.

We have now been advised by our Principals Allcargo that your supplier MAHAVIR APPAREALS is demanding US Dollers 84,353.31 from us as we released the goods in absence of the original B/L.

[ILLBGIBLE] the original Bills of Lading, please treat this as our formal claim to you for US Dollers 84,353.31 being the amount we have been debited with by allcargo movers (India) Pvt. Ltd.

Please revert no as we have to advise our Principals in India before close of business today.

In the meantime, we are holding all your shipments until this matter is resolved.”

30. A copy of the aforesaid letter was sent to defendant no.3 with the following endorsement:

“cc. All Cargo India, Mumbai
Attn: Vivek Kele –

We shall come back to you with full details upon receiving reply from Universal Apparels, Cargo was released without bank guarantee.

31. A bare perusal of the aforesaid letter leads to following inferences. Firstly, goods mentioned in Bills of Lading were received by defendant no.4. Secondly, those consignments were delivered to M/s. Universal without the consignee surrendering to defendant no.4 original Bills of Lading. Thirdly, defendant no.4 was fully alive to the fact that under the terms of Bill of Lading goods could not have been released without presentation of original Bill of Lading. Fourthly, the said delivery was effected in deviation of standard practice and express term of the contract, on account of the special relations which defendant no.4 shared with M/s. Universal and the request made by the latter. Fifthly, the principals of defendant no.4 apprised defendant no.4 that the consignor – plaintiff had lodged a demand for US\$ 84,353.31 for release of the goods in breach of contract. Sixthly, defendant no.3 had debited the account of defendant no.4 with the said sum of US\$ 84,353.31. Lastly, M/s. Universal was called upon to revert as defendant no.4 was to advice its principal in India. As is evident, a copy of the said communication was also marked to defendant no.3.

32. It would be contextually relevant to note the communication dated 17th September, 1996 (Exhibit-D) which appears to have forced defendant no.4 to address the aforesaid communication to M/s. Universal.

“WITH REF TO OUR MESSAGE DTD SEPT 2, 1996 ADD TO MR. DARIUS MCHARD (ENCL) AND ALSO MSG DTD SEPT 12, 1996 ADD TO MR. NDUNDU (ENCL) SHIPPER 13 IN POSSESSION OF ALL ORIGINAL BILLS OF LADING AND THE CARGO HAS BEEN RELEASED WITHOUT ACCOMPLISHING THE SAME.

KINDLY HAVE THE SAME CHECKED AND REVERT, PLEASE ALSO ADVISE IF THIS CARGO WAS RELEASED AGAINST BANK GUARANTEE, PLS FAX US THE COPY OF THE SAME, NOTE THIS IS VERY SERIOUS CASE AND WE REQUEST FOR YOUR IMMEDIATE REPLY.

ALSO THE SHIPPER HAS PUT A CLAIM OF USD 84,353.31 WHICH WILL BE FORWARDED TO YOU IN CASE THE CARGO HAS BEEN DELIVERED W/O THE ORIGINAL B/L OR PROCEDURES IN ABSENCE OF THE SAME.”

33. The aforesaid communication, in turn, was in response to the letter dated 14th September, 1996 (Exhibit-C3) addressed by the plaintiff to the defendant. The following contents of the said letter bear upon the controversy at hand.

“THIS IS IN CONTINUATION OF OUR LETTER DTD 13TH SEPTEMBER, 1996, WE WOULD LIKE TO INFORM YOU THAT THE TOTAL AMOUNT INVOLVED IN RESPECT OF FOLLOWING BILL OF LADING AMOUNTING TO USD 84,353.31 (APPX RS.29,87,795/-

B/L	DATE	VESSEL	VOY	INV	DT	AMOUNT USD
BOM/B-6/302179	09/07/96	CMBT TANA	24/111	MA 07/96	04/07/96	19721.12
BOM/B-6/302506	26/07/96	KILIMANJRO	1/113	MA 22/96	22/07/96	11731.46
BOM/B-6/302683	08/08/96	ORBIT	5/116	MA 14/96	31/07/96	13452.12
--DD--				MA 13/96	31/07/96	1750.00
BOM/B-	14/08/96	ORBIT	5/116	MA 18/96	08/08/96	15994.73

6/302816						
BOM/B-6/303093	28/08/96	CMBT TANA	25/119	MA 23/96	24/08/96	21723.88
				TOTAL US \$		84353.31

PLEASE TREAT THIS AS OUR FORMAL CLAIM FOR RS.29,97,795/- INVOLVED IN THIS CONSIGNMENT. YOU ARE HEREBY ADVISED TO LOOK INTO THE MATTER AND GIVE US THE EXACT STATUS OF THE ABOVE CARGOES IMMEDIATELY.

34. A conjoint reading of the aforesaid communications, in a reverse order, would indicate that in the wake of wrongful delivery of the goods under the six Bills of Lading, the plaintiff had categorically asserted that the total amount of the goods consigned under the six Bills of Lading was US\$ 84,353.31 equivalent to Rs.29,87,795/- approximately at the then prevailing rate of exchange. The plaintiff had lodged a formal claim for wrongful delivery of the goods without surrendering the original Bills of Lading. Thereupon, defendant no.3, on its part, lodged the claim with defendant no.4 for the wrongful delivery of the goods. Defendant no.4, in turn, claimed the said amount of US\$ 84,353.31 from M/s. Universal.

35. On the aspect of the value of goods which were wrongfully delivered, the learned Judge observed that the plaintiff had not adduced evidence aliunde in proof of the value of the goods consigned. However, on the strength of the aforesaid correspondence, the learned Judge was persuaded to hold that

the value of the goods was, in a sense, admitted by defendant nos.3 and 4.

36. Assailing the aforesaid approach, Mr. Shah would urge that in the absence of evidence in proof of the value of the goods it could not have been a matter of inference. Mr. Shah submitted that the plaintiff did not prove the invoices which were raised to evidence the sale and delivery of the goods.

37. In my view, the aforesaid approach of the learned Judge, City Civil Court is justifiable. It is only after the institution of the proceedings, the defendant made an endeavour to contest the claim of the plaintiff as regards the value of the goods. In contrast, in response to the communication dated 14th September, 1996, wherein the plaintiff had claimed the specified value of the goods consigned, defendant no.3 sought to hold defendant no.4 liable for the said amount and professed to debit the account of defendant no.4 for the said amount and defendant no.4, in turn, claimed the said amount from M/s. Universal.

38. Mr. Shah made an endeavour to persuade the Court not to attach much value to the aforesaid correspondence as the fact that the defendant no.4's account was debited with the said

sum of US\$ 84,353.31 has not been proved independently. I am afraid to accede to this submission. The fact that immediately after the claim was lodged by the plaintiff defendant nos.3 and 4, went on to claim the amount from the person, whom they held liable, detracts materially from the defence now sought to be raised. Undoubtedly, the Bills of Lading contain a disclaimer as regards the quantity, contents and value of the goods consigned. However, the plaintiff's claim is not rested on the value of goods mentioned on the Bills of Lading only. Post disclosure of wrongful delivery of the goods, the plaintiff instantaneously alleged and firmly claimed damages commensurating with the value of the goods, as assessed by the plaintiff. In this view of the matter, the defendants cannot seek to draw any mileage from the fact that there is no evidence aliunde to establish the value of the goods. From this stand point, in my view, the learned Judge, City Civil Court committed no error in returning an affirmative finding in favour of the plaintiff.

Point No.2 :

39. The principal plank of the challenge to the impugned decree was that defendant no.3 being an agent of a disclosed principal i.e. defendant no.2, could not have been sued for the

alleged wrongful delivery of the consignments by the another agent of defendant no.2. As a corollary, it was urged that there was no privity of contract between defendant nos.3 and 4 and, therefore, defendant no.3 could not have been held liable for the alleged wrongful delivery by defendant no.4.

40. Mr. Shah banked upon the provisions contained in Section 230 of the Indian Contract Act, 1872 to bolster up the submissions that the defendant no.3 being an agent of the disclosed principal could not have been held personally liable.

Section 230 of the Contract Act, 1872 reads as under:

“S.230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.—In the absence of any contact to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. —In the absence of any contact to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.” Presumption of contract to contrary.—Such a contract shall be presumed to exist in the following cases:—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- (2) where the agent does not disclose the name of his principal;
- (3) where the principal, though disclosed, cannot be sued.”

41. From the text of Section 230, it becomes clear that in the absence of contract to the contrary an agent can neither personally enforce the contract entered into by him on behalf of his principal nor can he be made personally liable for the

obligation which emanates therefrom. A contract to the contrary is, however, presumed to exist in the situations enumerated therein, namely, (i) contract by an agent for the sale or purchase of goods for a merchant resident abroad, (ii) non-disclosure of the name of the principal, (iii) disclosed principal cannot be sued.

42. In the context of the facts of the case, the effect of disclosure of the principal by defendant no.3 is pressed into service on behalf of the defendant no.3. On first principles, where the contract is entered into by an agent contracting on behalf of the foreign principal who is named or disclosed, the agent cannot be sued personally nor made personally liable.

43. The real issue that comes to the fore is whether the situation at hand is governed by the provisions contained in Section 230 of the Act in the context of the juridical status of defendant no.3 qua defendant no.4. Whether defendant nos.3 and 4 were simply co-agents of defendant no.2 or the jurial relationship between defendant nos.3 and 4 transcended the status of independent co-agents, is the moot question for consideration.

44. Mr. Shah, endeavoured to impress upon the Court that Bills of Lading unequivocally disclose the status of defendant no.3 as an agent of the named principal i.e. defendant no.2. With this disclosure, the wrongful delivery of the goods by defendant no.4 could not have been made a foundation for the liability of defendant no.3, was the thrust of the submission of Mr. Shah.

45. Ms. Thakkar submitted that the material on record clearly shows that defendant no.4 was in fact the agent of defendant no.3. Attention of the Court was invited to the contents of the afore-extracted documents and further correspondence between the defendants *inter se* and with M/s. Universal. It is imperative to note, in the letter dated 13th September, 1996 addressed to M/s. Harilal Bhawanji, in response to a grievance made by the plaintiff about wrongful delivery of the goods (by letter dated 11th September, 1996), defendant no.3 made an effort to alleviate the grievance of the plaintiff by asserting *inter alia* “we have instructed our office in Mombassa to release the cargo till so time the original B/L’s for all 3 consignments are accomplished.”

46. The relationship between defendant nos.3 and 4, in the contemplation of defendant no.4, also assumes critical

significance. In the letter dated 19th September, 1996, extracted above, at more than one places, defendant no.3 was referred to as the principal of defendant no.4. Firstly, M/s. Universal was informed that defendant no.4's Principals Allcargo had informed defendant no.4 that the plaintiff had lodged a claim. Secondly, M/s. Universal was called upon to reveal before the close of business on that day as defendant no.4 was to advise its principals in India. Thirdly, the said communication was addressed to defendant no.3 only and not to defendant no.2.

47. Mr. Shah made a faint attempt to wriggle out of the situation by canvassing a two-fold submission. One, a mere reference in the letter dated 13th September, 1996 to defendant no.3 as "our office in Mombassa" is not sufficient to establish the jural relationship. And in the letter dated 19th September, 1996 the use of the expression, "our Principals Allcargo" is to defendant no.2 alone. It is true that it may not be safe to draw an inference about the nature of relationship by the choice of words in business correspondence, only. However, in the case at hand, reference to such relationship at multiple places in the correspondence exchanged between the parties betrays the true nature of the relationship. It is pertinent that neither defendant no.2 ever addressed any letter to defendant no.4 nor

defendant no.4 gave any explanation to defendant no.2. On the contrary, defendant no.4 expressly referred defendant no.3 as its principal in India. To add to this, in none of the communications by defendant no.3 preceding the institution of the suit defendant no.3 ever controverted the claim of the plaintiff that defendant no.4 was the agent of defendant no.3. Contemporaneous conduct, therefore, militates against the defence sought to be urged on behalf of the defendant no.3.

48. It would be contextually relevant to appreciate the manner in which the defendant – Rajendra Randhive (DW-1) fared in cross-examination on the aspect of the *inter se* relationship between defendant nos.2 and 3. Mr. Randhive (DW-1) conceded in the cross-examination that the written statement on behalf of defendant nos.1 and 2 is signed by Mr. Sashikiran Shetty. He conceded in unequivocal terms that Mr. Shetty is the Director of Allcargo Movers, defendant no.3. To a pointed question as to who were the other directors of defendant no.3, Mr. Randhive (DW-1), replied that, to his knowledge, only Mr. Shetty was the Director of defendant no.3. He feigned ignorance as to whether there were any common directors of defendant nos.2 and 3. It would be relevant to note that Mr. Randhive (DW-1) conceded

that Mr. Shetty was (then) still working with defendant no.3 and was also available in Mumbai.

49. Defendant nos.1 to 3 chose not to examine Mr. Shetty. If the evidence of Mr. Randhive (DW-1) is to be believed, Mr. Shetty, who signed and verified the written statement on behalf of the defendant nos.1 and 2 was the Director of defendant no.3 and controlled the affairs of defendant no.3. This factor cannot be said to be immaterial or inconsequential. If the contents of the documents, extracted above, reflecting upon the relationship between defendant nos.3 and 4 are considered in juxtaposition with the aforesaid nature of the controlling influence over the affairs of defendant nos.1 to 3 by one and the same individual, an inference becomes irresistible that the status of defendant no.3 cannot be construed to be that of a mere agent of a disclosed principal. If defendant no.3 wanted to dispel the position, it was incumbent upon the defendant no.3 to examine Mr. Shetty to clear the air and establish that defendant no.3 was a mere agent of a disclosed principal.

50. The manner in which defendant no.4 was selected as an agent at the port of delivery also bears upon the controversy. Mr. Randhive (DW-1) admitted in no uncertain terms that when defendant no.3 got Bill of Lading, it had no stamp of the agent

at the port of discharge i.e. Walford, defendant no.4. Mr. Randhive (DW-1) further conceded that the stamp of Walford was put by defendant no.3 at the time of issue of Bill of Lading to the plaintiff. As to at whose instructions defendant no.4 was selected as the agent at the port of delivery, Mr. Randhive (DW-1) claimed that a list of agents was provided by defendant no.2.

51. Laying emphasis on the aforesaid assertion that defendant no.4 was the handling agent of defendant no.2, at the port of destination, Mr. Shah would urge that the absence of nexus between defendant nos.3 and 4 is crystal clear. If the evidence is read as a whole, the inference which Mr. Shah wants the Court to draw does not commend itself. Defendant no.3 had both the authority and choice, to select the agent at the port of destination. Defendant no.3, in the totality of the circumstances, cannot be permitted to wriggle out of the situation by simply contending that defendant no.4 was an agent of defendant no.2 at the port of destination.

52. The aspect of the liability of the defendants, in the case at hand, is required to be appreciated in the light of undisputed wrongful delivery of the goods, in breach of an express term of contract. In this backdrop, Ms. Thakkar was justified in placing

reliance on a judgment of the Supreme Court in the case of *Dhian Singh Sobha Singh and Anr. vs. Union of India*¹ wherein the liability of the carrier for wrongful delivery of the goods was expounded as under:

“15. It would be relevant to consider what is the exact scope of the two forms of action, viz., action for wrongful conversion and action for wrongful detention, otherwise known as action in trover and action in detinue. A conversion is an act of willful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. If a carrier or other bailee wrongfully and mistakenly delivers the chattel to the wrong person or refuses to deliver it to the right person, he can be sued as for a conversion. Every person is guilty of a conversion, who without lawful justification deprives a person of his goods by delivering them to some one else so as to change the possession. (Salmond on Torts, 11th Edition, pages 323, 324, 330).

16. The action of detinue is based upon a wrongful detention of the plaintiff's chattel by the defendant, evidenced by a refusal to deliver it upon demand and the redress claimed is not damages for the wrong but the return of the chattel or its value. If a bailee unlawfully or negligently loses or parts with possession he cannot get rid of his contractual liability to restore the bailor's property on the termination of the bailment and if he fails to do, he may be sued in detinue. (Clerk & Lindsell on Torts, 11th Edition, pages 441 and 442: paras. 720 & 721).”

53. In the case of *Government of Goa through Commissioner and Secretary (Finance) vs. Goa Urban Co-operative Bank Ltd. & ors.*² a Division Bench of this Court enunciated the liability of the principal for the act of the agent as under:

“9. From the press communique as well as from the terms of the loan it is clear that the RBI was to act as manager for

1 AIR 1958 SC 274.

2 2011(2) Mh.L.J. 37.

the loan. The RBI in a sense was, an agent of the appellant, the State of Goa, for the purpose of managing the issue of the loan. Designated branches of the Sbi which were to receive the applications for the loan, were also to act as agents of the appellant State of Goa and/or sub-agents of the RBI which was the manager to the issue. In our view, the principal is responsible for the negligence of the agent during the course of his employment as an agent. The liability of the principal for the negligence and/or wrongful act of the agent is on the ground that the principal is a person who has selected the agent and the principal having delegated the performance of certain class of acts to the agent, the principal should bear the risk. All that is necessary for holding the principal liable is that the acts should have been committed by the agent in the course of his employment. Although the principal did not authorise the agent to act negligently, the principal cannot escape the liability for the negligence of the agent.

10. In *Kailas Sizing Works vs. Municipality of Bhivandi and Nizampur, 1968, Mh. L.J. 916 = AIR 1969 Bom. 127*, a Division Bench of this Court in para 47 has held:

47. The defendants contended that they had engaged qualified engineers and experienced contractors and, therefore, they could not be guilty of negligence. With regard to the contractors however much experienced, they would merely carry out the work according to the plans prepared by the Municipality. If the engineers are negligent, the defendants would be liable. The liability of principal for the wrongful act of his agent rests on the grounds that the principal is a person who has selected the agent and that the principal having delegated the performance of a certain class of acts to the agents; the principal should bear the risk. All that is necessary is that the act should have been committed by the agent in the course of his employment, although the principal did not authorise, or justify, or participate in the act or even if he forbade it or disapproved of it. The liability of the principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them.

We respectfully agree with the observations quoted hereinabove."

(emphasis supplied)

54. In the aforesaid view of the matter, I am not inclined to accede to the submission on behalf of the appellant that it could not have been fastened with the liability for the wrongful

delivery of the goods by defendant no.4 as defendant no.3 was an agent of the disclosed principal.

Point No.3:

55. The challenge to the impugned decree based on failure on the part of the plaintiff to mitigate the loss, in strict sense, does not emerge from the facts of the case and evidence adduced by the parties. Edifice of this submission was sought to be built on the alleged rejection of the goods by M/s. Universal, the consignee. It was sought to be urged on behalf of defendant no.3 that after M/s. Universal addressed a communication on 19th September, 2018 that it had rejected the goods, no steps were taken by the plaintiff to take back the goods and mitigate the loss.

56. Ms. Thakkar was justified in advancing a criticism that the said fact of the alleged rejection of the goods has not been established. The two communications; first, dated 19th September, 1996 purported to be addressed by M/s. Universal to Walford and, second, the reply to the legal notice dated 2nd April, 1997 on behalf of M/s. Universal, which record the alleged rejection of goods, were not proved in evidence.

57. Even otherwise, it is imperative note that in the contemporaneous correspondence exchanged with the plaintiff and defendants *inter se*, there was no reference to the fact that the goods were allegedly rejected by M/s. Universal. On the contrary, the defendants banked upon correspondence indicating that the plaintiff had allegedly instructed M/s. Universal to redeliver the goods to M/s. Fashionette Industries Ltd.. It is a different matter that the said correspondence also appears to be in the nature of an unilateral offer without any acceptance by or confirmation from the plaintiff.

58. The defence of rejection of goods by M/s. Universal is required to be considered in the backdrop of indisputable position of wrongful delivery of the goods to M/s. Universal. At the very moment of the wrongful delivery, the defendants were guilty of breach of contract. The plaintiff had already parted with the possession of the goods. There is no contemporaneous material to indicate that the alleged rejection of the goods by M/s. Universal was brought to the notice of the plaintiff. An abstract submission that the plaintiff ought to have taken steps to mitigate the loss in the light of these hard facts, is unworthy of acceptance.

59. Reliance placed by Mr. Shah on the judgment of the Supreme Court in the case of *M. Lachia Setty and Sons Ltd. vs. Coffee Board, Bangalore*³, does not seem to advance the cause of the defendant no.3. In fact, the observations in paragraph 14 in the case of *M. Lachia Setty* (supra), underscore the fact that the principle of mitigation of loss does not arm a party in default with an instrument to avoid the claim for damages.

Paragraph 14 reads as under:

"14. At the outset it must be observed that the principle of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the Court while awarding damages. The correct statement of law in this behalf is to be found in Halsbury's Laws of England (4th Edn.) Vol. 12, para 1193 at page 477 which runs thus:

"1193. Plaintiff's duty to mitigate loss. The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided."

Again, in para 1194 at page 478 the following statement occurs under the heading 'Standard of conduct required of the plaintiff:

"The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the

3(1980) 4 SCC 636.

defendant whose breach of contract has occasioned the difficulty.”

Point No.4:

60. The issue of duty drawback allegedly availed by the plaintiff, even if taken at par, does not advance the cause of the submission to the extent desired by the appellant. Mr. Shah banked upon an admission in the cross-examination of Badarmal Modiram Jain (PW-1) that the plaintiff might have received the benefit of duty drawback. On this premise, an endeavour was made to bolster up a case that the plaintiff can be assumed to have received the consideration and, therefore, the plaintiff cannot again seek damages.

61. Plainly, the submission is against the weight of the evidence on record. It is nobodies case that either M/s. Universal, the consignee, or any other party had paid the value of the goods consigned under the Bills of Lading to the plaintiff, much less any evidence. An inferential submission that availing of benefit of duty drawback implies receipt of consideration is simply far fetched. Conversely, from the perusal of the provisions contained in Section 75 of the Customs Act, 1962 such an inference cannot be said to be automatic. The second proviso to sub-section (1) of Section 75 envisages a situation

where any duty drawback has been allowed but the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India and empowers the Central Government to specify the procedure for recovery or adjustment of the amount of such drawback.

62. The conspectus of aforesaid consideration is that none of the exceptions taken on behalf of the appellant to the impugned decree merits acceptance.

63. An aspect, which, however, warrants consideration is the justifiability of the relief granted by the learned Judge, as regards the currency in which the damages are quantified and the rate at which interest has been awarded thereon. As indicated above, when the plaintiff first lodged the claim for damages with defendant no.3 vide communication dated 14th September, 1996 (Exhibit-C3), the plaintiff had quantified the damages at US\$ 84,353.31 equivalent to Rs.29,87,795/-, at the then prevailing rate of exchange. Nay, in the concluding part of the said communication, the plaintiff expressly asserted that it should be treated as a claim for Rs.29,87,795/-. The claim for damages thus stood crystalized at Rs.29,87,795/- as of 14th September, 1996. In this view of the matter, a decree for damages on the basis of the value of the goods, as assessed by

the plaintiff, ought to have been passed in Indian currency instead of US Dollar.

64. Secondly, the award of interest at the rate of 24% also appears to err on the side of excessiveness. Undoubtedly, the underlying transaction was purely commercial. Yet, award of interest at the rate of 24% p.a. appears to be a little harsh and exorbitant. I am, therefore, inclined to modify the impugned decree by awarding interest at the rate of 18% p.a.

65. Resultantly, the appeal deserves to be partly allowed. Hence, the following order:

: O R D E R :

- (i) The appeal stands partly allowed.
- (ii) The impugned decree stands modified as under:
 - (a) The suit stands partly decreed.
 - (b) Defendant nos.1 to 4 do jointly and severally pay a sum of Rs.29,87,795/- along with interest at the rate of 18% p.a. from the date of the institution of the suit till payment and/or realization.
- (iii) The appellant shall pay the costs of the appeal to respondent no.1 – plaintiff and bear its own.
- (iv) Decree be drawn accordingly.

[N. J. JAMADAR, J.]