Indian Supreme Court: Ports are not entitled to levy storage/demurrage charges for abandoned cargo against shipowners and agents

More than 20 years ago, the case came to Gard lawyer, Kelly Wagland, in our London office and now it has a final resolution. We thank lawyers, Amitava Majumdar, Damayanti Sen & Tripti Sharma of the law firm Bose & Mitra & Co, for providing the details of the Indian Supreme Court's decision in the case of The Chairman, Board of Trustees, Cochin v. M/s Arebee Star Maritime Agencies Private Ltd. & Ors ("Arebee"). The judgment is a significant positive development for liner operators trading to India.

Published 31 August 2020

In recent years, Gard has received numerous reports of abandoned or otherwise uncollected containers in ports in India, Pakistan and Bangladesh. These containers and cargo were mainly abandoned due to their contents having been misdeclared by shippers. Liner operators have been subject to significant storage and other costs for the period that the containers (and cargo therein) remained unclaimed. The Arebee judgment confirms that Ports in India cannot hold shipowners, vessel agents or steamer agents liable for storage and demurrage fees once the Port has taken charge of the containers and cargo, and provided a receipt for them.

The issue of these potentially significant storage and related costs have long been disputed, and was referred to the Indian Supreme Court as part of a broader issue of interpretation of the provisions of the Major Port Trusts Act, 1963 **("the MPT Act").** The terms of this reference included the question of the extent of liability, if any (whether statutory or contractual) of the Port Trust to destuff containers that are entrusted to it and return the empty containers to the shipping agent.

Background to the Arebee Decision

The underlying dispute in **Arebee** concerned a containerized cargo of "old" synthetic woolen rags **("the Cargo")** , which lay uncleared at the Cochin Port Trust premises from 1998. The Cargo was destuffed from the container to enable Customs examination. On inspection, the Customs department alleged that the consignment in fact contained "brand new clothes" (and not the rags declared by the consignee). This attracted high duties, penalties and other charges. This misdeclaration of cargo caused significant delays in clearing the goods. The consignees subsequently refused to clear the cargo (largely due to the mounting storage costs). Whilst this dispute between the Consignee and Customs authorities was ongoing, the Cargo and the container lay uncleared at the Port premises. The Port accordingly levied storage charges on the Cargo and the container and looked to the steamer agents/owners of the containers for these dues for the entire period that the cargo remained on the Port's premises.

The steamer agents/owners of the containers filed an action before the Kerala High Court, contending that they were not required to pay storage charges beyond the period of 75 days from the date of the landing of the abandoned cargo pursuant to the MPT Act and the Tariff Authority of Major Ports **("TAMP")** Orders dated 10 th November 1999, 19 th July 2000 and 13 th September 2005. This petition was scheduled to be heard together with similar matters also concerning alleged misdeclared cargoes.

In its first instance judgment, the Kerala High Court noted that agents had repeatedly requested the Port to destuff the abandoned containers. The Port had however refused to do so, on the grounds of lack of space. It further noted that the exorbitant storage charges levied on shipowners and their agents accrued (and continued to accrue) due to (a) the consignee's failure to take delivery of the cargo; and (b) the Port's failure to destuff the containers. The Kerala High Court found that the word "*may*" in Sections 61 and 62 of the MPT Act imposed an obligation on the Port to sell or otherwise dispose of the goods as soon as possible where a consignee fails to take delivery of the cargo. It further found that the Port Trust was entitled to demand ground rent for a maximum of 75 days in line with the TAMP Orders.

The Kerala High Court's judgment was appealed to the Supreme Court by the Port. The Supreme Court noted the conflicting precedents on this issue. The Division Bench of the Supreme Court therefore referred the matter to a larger bench to finally determine the issue.

The Supreme Court bench's findings

The Court considered the MPT Act and the Customs Act, 1962 **("Customs Act")** thoroughly in arriving at its decision. This provides much needed clarification on the issue of the shipowners' and agents' liability to the Port for storage charges. In summary:

(a) Who is the Owner in relation to goods? Interpretation of Section 2(o) of the MPT Act

The MPT Act defines the "owner" of goods and an "owner" of a vessel separately, and makes clear that the services rendered to vessels for which dues have to be paid by vessels (i.e. agency fees) are entirely separate and distinct from services rendered insofar as goods that are landed are concerned.

The definition for "owner" in relation to goods includes persons beneficially entitled to the goods such as the shipper, consignor, consignee and also agents for sale, custody or loading/unloading of such goods. The Court held that the expression "*agent for the... loading or unloading of such goods*" was sufficiently clear to include the vessel's agents involved in the loading and unloading of goods. The Court also found that loading or unloading of goods could also be arranged by the steamer's agent in which case such agents would also fall within the definition of "owner" under the MPT Act. Although the MPT Act does not expressly refer to shipowners as "owners" of cargo, the Court found that it would be incongruous to hold that the shipowner's agent is included in the definition, but not the shipowner itself.

The Court then looked into Section 42(2) of the MPT Act, which provides that a Board/Port Trust may, if requested by the "owner", take charge of the goods, and shall give a receipt. The Court held that it is therefore obvious that if the ship owner or its agent are not "owners", the Port would have no basis taking charge of the goods from the ship-owner or its agents.

(b) Discharge of liability once the goods are handed over to the Port

The Court further noted that under the MPT Act, once goods were taken over by the Port and a receipt given for them, any person to whom a receipt has been given (including the shipowner and agents) could no longer be held liable for any loss or damage to the goods.

The other side of the coin is that the Port became, from the time a receipt was duly issued, a bailee of the cargo and was responsible for the loss, destruction or deterioration of the said goods.

(c) Payment of storage costs

The Court further considered the MPT Act and observed that:

(i) Warehouse or storage charges on goods to be retained in the custody of the Port for discharge of a ship-owner's liens are payable only by the party entitled to such goods, which can never be the ship-owner or the ship-owner's agent after the goods have been landed, and the vessel has departed the port.

(ii) A Notice of Sale for goods in the Port's custody need only be given to the consignee, or other persons who are beneficially entitled to the goods. These persons are then obliged to remove the said goods.

(iii) The Court further noted that where goods in the custody of the Port are proposed to be removed or sold, a notice may also be served on the "agents of the vessel by which such goods were landed". It clarified that the notice issued to the agent of the vessel is only relevant where the vessel's agents may have indicated that the ship-owner has a lien for freight and other charges, which must be satisfied out of the sale of such goods. Therefore, the ship-owner or its agents are not persons who have to comply with the Port's notice, as they are neither persons who are the owner of the goods, or other persons entitled to the goods.

These findings affirm the position that once the goods are delivered into the custody of the Port and a receipt is obtained from the Port, the Port cannot then look to the ship-owner/ vessel agent/steamer agent for any charges related to the goods. Thus, goods that are stored on the premises of the Board have a nexus *only* with the owner or other persons entitled to those goods, and not with the agent of the vessel or the vessel itself.

(d) Is the Port obligated to dispose of goods placed in its custody within a certain period of time?

The Supreme Court disagreed with the first instance Court that the word *"may"* in Sections 61 and 62 of the MPT Act must be read as " *shall*" . The Supreme Court found that the Port had the discretion to sell the goods in certain circumstances mentioned in Sections 61 and 62. The Port however was not entitled to exercise its discretion arbitrarily, as it was constrained by the Constitution of India, being a State body.

That being said, the Court found that the Port has a constitutional duty to sell the goods in its custody within a reasonable time from which it takes custody of those goods. Section 63(1)(c) of the MPT Act imposes a maximum of four months from the date of landing of the goods. If the Port is unable to sell the goods within this period, it must provide a reasonable explanation as to why not. If the explanation is found to be reasonable, and the owner or person entitled to the goods does not remove the goods thereafter, the Port is entitled to levy penal demurrage on the owners of the goods.

(e) Whether Containers in which goods are imported also form part of the goods?

The Court observed that both the Customs Act and the MPT Act contain parallel provisions for authorities under each respective Act to take charge of, store, and sell imported goods, and that these provisions should be read together. The Court considered various judgements (and their treatment of the "original package doctrine" as developed by the US Courts), and held that under the Customs Act, a container, being a receptacle in which goods are imported, cannot be said to be "goods" that are imported. Once destuffing takes place, the container has to be returned either to the ship-owner's agent, or to the person who owns such container.

The Court further noted that irrespective of the type of goods being imported, the value of the imports do not take into account the value of the container, as only the goods that are stuffed in the containers are considered imports by law.

(f) Legal effect of endorsement of a Bill of Lading different from endorsement on bill of lading by a Steamer Agent

The "endorsement" referred to in Section 1 of the Indian Bills of Lading Act, 1856, is the endorsement made by the consignor or owner of the goods in favour of such endorsee on the bill of lading, so that title to property is then transferred to the endorsee. The Court confirmed that an endorsement on a bill of lading by a steamer agent indicating that goods have been delivered is not an endorsement under the Bills of Lading Act 1856.

Conclusion

The judgment in **Arebee** has conclusively determined that shipowners and agents are not liable for storage charges imposed by the Port in respect of abandoned/ unclaimed cargo, where the cargo has been placed in the Port's custody and a receipt for the same obtained.

The judgment is all the more relevant in the context of the recent events in Beirut which highlighted the hazards of storing dangerous cargo in Port for extended periods of time. The situation is further exacerbated in the scenario of the ongoing COVID-19 crisis, where as a knock on effect of businesses ceasing or scaling down operations, the Club has seen more instances of unclaimed or abandoned cargo, leading to exorbitant storage costs imposed.

The judgment will bring much relief to ship-owners/streamer agents/ vessel agents who have been subject to these onerous charges through no fault of their own, with no recourse.

The judgment is also significant in that it expressly places a strict burden upon Ports to dispose of abandoned/unclaimed cargo within reasonable timeframe, and also to destuff and return the empty containers in a timely manner.

It is important to note that the judgment specifically applies to the 13 major ports in India. In respect of cargo discharged in the minor ports and the private ports on the vast Indian coastline, the Club recommends that members review the terms of their specific contracts with non-MPT ports to better understand the extent of their liability. While the judgment would apply in principle to such ports, the terms of the contract between the parties would take precedence as these ports are not governed by the MPT Act.

We would like to acknowledge and thank Senior Advocate Prashant Pratap who represented the successful liner operators in the Supreme Court and was appointed by Gard on behalf of one of our members throughout the course of the litigation.