IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 2640 of 2011

In THE MATTER OF:

An application under Article 102 (1) & (2) of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Md. Ibrahim

.....Petitioner

-Versus-

The Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resource Division, Segunbagicha, P.S. Ramna, Dhaka and others

.....Respondents

Mr. A.F. Hassan Ariff, Advocate with

Mr. Md. Bahadur Shah, Advocate

.....For the petitioner

Mr. Imranul Kabir, Advocate with

Ms. Farzana Ahmed, Advocate

.....For the Respondent No.4

Mr. Md. Ramzan Ali Sikder, Advocate

with

Mr. Tanim Hossain, Advocate

.....For the Respondent No.6.

Ms. Israt Jahan, A.A.G. with

Ms. Kashefa Hossain, A.A.G.

.....For the Respondent Nos. 1-3

Heard on: 24.01.2012, 25.01.2012, 02.02.2012, 07.02.2012, 09.02.2012, 20.02.2012, 26.02.2012, 27.02.2012, 29.02.2012, 01.03.2012, 15.03.2012, 18.03.2012, and judgment on: 16.10.2012.

Present:

Mr. Justice Syed Refaat Ahmed

And

Mr. Justice Md. Ashraful Kamal

Md. Ashraful Kamal, J:

This Rule Nisi was issued at the instance of the petitioner Md. Ibrahim on an application under Article 102(1) & (2) of the Constitution of the People's Republic of Bangladesh calling upon the respondents to show cause as to why the holding of the imported duty paid goods covered under Latter of Credit No. 209610010034 dated 18.03.2010 and B/E No. C137775 dated 19.10.2010 and B/E No. C63728 dated 23.05.2010, Bill of Lading No. S00005349 dated 11.04.2010 and Bill of Lading No. S00005402 dated 15.04.2010 should not be declared to have been done without lawful authority and is of no legal effect and as to why the respondents should not be directed to release the said imported duty paid goods.

Brief facts, necessary for the disposal of this Rule, are as follows:-

The petitioner opened a Letter of Credit (LC) being No. 209610010034 dated 18.03.2010 for import of 4000 Metric Tons of APH WHEAT (New Crops) covered under H.S. Code No. 1001.90.19 @ US$ 268 per Metric Tons, as per proforma invoice No. 1023/2010 dated 15.03.2010 and total value of the goods at about US$ 10,72,000.00 (including freight). Thereafter, consignment arrived at the Chittagong Port under 1 set of Invoice and 1 set of house Bill of Lading against two shipments. Then, the petitioner paid the entire L.C value (including the freight) to the concerned Bank. Accordingly, the Bank delivered the duly endorsed shipping documents to the petitioner. Thereafter, petitioner submitted House Bill of Lading alongwith all others relevant documents before the Custom Authority for assessment, and on the basis of those documents Custom Authority assessed the petitioner duty and tariff. Then, the petitioner on 09.02.2011 paid entire custom duty, VAT and other charges of the goods in question. But, the respondent No. 4 did not deliver the aforesaid goods to the petitioner.

Mr. A.F. Hasan Ariff along with Mr. Md. Bahadur Shah, appearing for the petitioner submits that the petitioner submitted bill of entries on 14.10.2010 and as per the provisions of Section 82A of the Customs Act the respondents are under a statutory obligation to release the consignment within 3 (three) days, but the respondents

failed to release the said duty-paid-goods. He further submits that the Custom Authority and Port Authorities are under statutory obligation to release goods once assessed, but in spite of submission of all the relevant documents such as B/E, Bank Slip, Atomic Energy Certificate, Clearance of Agriculture Directorate, Packing List, Commercial Invoice, Certificate of Origin, Radioactivity Statement, Proforma Invoice, L/C and Custom Assessment Papers including freight pre-paid bill of lading duly endorsed by the bank, the respondents did not deliver the goods to the petitioner. It is asserted that the respondents, in particular respondent Nos. 6 and 7, cannot operate and function without interaction amongst each other and that the respondent Nos. 6 and 7 being instrumentalities of respondent Nos. 2, 3 and 4 the respondents are jointly and severally withholding release of the consignment on the mala fide motivated pretext (based on respondent No. 6 pretext) that there is a freight dispute pending before the Australian Court amongst the supplier/ shipper, Australian Commodity Management (pvt.) Limited and Gilgandra Marketing Cooperative Limited and during pendency of the said proceeding of the Australian Court the goods cannot be delivered.

Mr. Ariff further submits that the petitioner earlier released goods covered under house bill of lading No.S00005367 dated 29.04.2010 under the very same L/C No.209610010034 dated

18.03.2010 from same shipping Co. i.e, respondent No. 6 on 05.07.2010 against the shipping document endorsed by the L.C opining bank. The shipping documents contained house Bill of lading No. S00005367 dated 29.04.2010 (ANNEXIRE-F).

Mr. Ariff argues that in the instant shipment the freight stands prepaid. Given that there is no dispute that, the beneficiary bank duly received payment against freight along with consideration for wheat, the bank on receipt of full payment released shipping documents including House Bill of Lading. It is submitted that the petitioner having cleared L/C amount inclusive of freight and customs duty, taxes and other charges has complete ownership over the goods and the respondent No. 7 as an instrumentality of the Customs Authority and Port Authority resultantly has no legal competency to withhold delivery under any plea. He also submits that respondent No. 5 (bank) already certified that money has been transferred from the said bank to the negotiating bank (National Australia Bank Limited) on several dates. The suppliers declared that they have received the payments through National Australia Bank Limited and the documents established that the petitioner's importer had discharged his pecuniary liability and the supplier exporter has duly acknowledged the same.

The respondents have entertained discharge of the cargo and assessed custom duties and taxes treating the goods belonging to the importer within the territory of Bangladesh, thereby, Mr. Ariff submits the imported goods fall outside the scope of any extra-territorial claim. Accordingly, it is submitted that the goods cannot be withheld from delivery on the plea of extra-territorial claim against third parties.

Mr. Ariff also argues that Section 3 of the Territorial Water and Maritime Zone Act, 1974 enables the Govt. of Bangladesh to declare limit/extent of territorial waters of Bangladesh. The sovereignty of Bangladesh extends to its territorial waters as per provision of Section 3 (3) of the said Act, Section 3 (3) is quoted below;

> "*The sovereignty of the republic extends to the territorial waters as well as to the air space over and the bed and subsoil of such waters"*.

Notwithstanding that a vessel may fly flag of any other country, when it enters the territorial waters of Bangladesh the vessel and cargo becomes subject to the municipal laws of Bangladesh. In the event that the vessel thereafter seeks entry into the Chittagong Port Area, it is to be noted that the Port area is delineated under Section 4 and 5 of the Ports Act, 1908 as well as Section 3 of CPA

Ordinance 1976. The process that thereafter ensures is that the shipping agent submits import manifest under Section 43 and 44 of Customs Act to the Customs authority furnishing information about Bangladesh bound cargo to be unloaded under the custody of the Post Authority. The Cargo unloaded is subject to the elaborate legal regime established under the Import and Export (Control) Act, 1953, Import Policy Order, Export Policy order adopted from time to time. The Chittagong Port is at the same time subject to fiscal and legal regime governed in particular and specifically by the Customs Act 1969. The Chittagong Port is a customs station [sec 2(k)] and Customs Port [sec 2 (j)] read with section 9 (a) of Customs Act. Section 9 (a) stipulates;

> *"The ports and airports which alone shall be customs ports or loading of goods for export or any class of such goods"*

Section 2 (i) read with section 10 defines the limit of the Customs Station. Section 10 stipulates;

> *"The Board may, by notification in the official Gazette- (a) specify the limits of any customs –station; and (b) approve proper places in any customs –station for the loading and unloading of goods or any class of goods."*

Section 2 (iii) read with section 9 (b) of the Customs Act define Customs Inland Container Deport. Section 9 (b) stipulates;

> *"The places which alone shall be land customs-stations [or customs-inland container deport] for the clearance of goods of any class of goods imported or to be exported by land or inland waterways."*

The cargo is unloaded in the Port area which is simultaneously a Customs area. The Port Authority, a statutory public authority exercises control over the cargo. The Port Authority as a statutory public authority is included within the definition of State, as per definition clause contained in Article 152 (1) of the Constitution. The Customs authority having control over the cargo as an agency of the sovereign State, exercises its authority to levy customs duties and taxes. The cargo, therefore, is not subject to jurisdiction of foreign legal regimes and foreign judgment. The assessment by the Customs Authority established as the revenue agency of the Government, reflects treatment of the cargo as being under sovereign control of the State and that the cargo is owned by the importer who has surrendered to the revenue legal regime of the state.

The above legal analysis submitted on by Mr. Ariff is further extended in his submission that the foreign judgments have no binding force in territories of Bangladesh as there is no reciprocal treaty under section 44A of the Code of Civil Procedure. Section 44A stipulates;

> *"(1) Where a certified copy of a decree of any of the superior Court of any reciprocating territory has been filed in a District Court, the decree may be executed in Bangladesh as if it had been passed by the District Court.*
>
> *(2)Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this*

section, be conclusive proof of the extent of such satisfaction or adjustment.

(3)The provision of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 130.

Explanation II- " reciprocating territory" means country or territory as the Government may, from time to time, by notification in the official Gazette, declare to be reciprocating territory for the purposes of this section and "Superior Courts", with reference to any such territory, means such courts as may be specified in the said notification.

Explanation III- "Decree" with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other charges of a like nature or in respect of a fine or other penalty, and (b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.

It is accordingly explained on behalf of the petitioners that the cargo carried into the sovereign territory of Bangladesh and discharged therein (section 73 of the Customs Act) is subject to fiscal liability for entry into Bangladesh for home consumption or warehousing (section 79 of Customs Act). The cargo is discharged from the vessel free from any encumbrance whatsoever. The New South Wales Court's jurisdiction and litigants legal control (if any) do not, therefore, extend into the sovereign territory of Bangladesh in general and/or in particular to the Chittagong Port. The Chittagong Port Authority Ordinance 1976 does not recognize the notion of a ship owner's lien for freight under the provision of Section 22 of the Ordinance. Section 22 is quoted below;

> *"(1) If the master or owner of any vessel, at or before the time of landing from such vessel of any goods at any dock or pier, gives to the Authority notice in writing that such goods are to remain subject to a lien for freight, prim age or average of any amount to be mentioned in such notice, such goods shall continue to be liable, after the landing thereof, to such lien.*
>
> *(2) Such goods shall be retained either in the warehouses or sheds of the Authority or, with the consent of the Collector of Customs, in a public warehouse, at the risk and expense of the owner of the said goods, until the lien is discharged as hereinafter mentioned."*

He also submits that the Master or owner of the vessel has not at or before the time of landing of cargo at the Port notified the Chittagong Port Authority in writing as mandated under section 22 exercising any lien over the cargo. The cargo therefore landed free from any encumbrance whatsoever including any lien. The facts as emerged from the foreign judgment (Annexure-3 to the Affidavit-in-opposition by respondent No.6), establish that the litigation is amongst Australian litigants and that plaintiff has undertaken to pay into court on account of freight and other charges. It is submitted that the said foreign judgment evidences that the petitioner-importer was not a party to the proceedings suffering any claim, the petitioner-importer had no liability including liability to pay freight, and that the petitioner's imported cargo therefore is free from encumbrance and he is entitled to delivery of the same.

Mr. Ariff also argues that the respondent No.7, the ICD is a licensee under the Customs Act as well as of the Port Authority. As licensee of the Customs/Port Authority, the ICD discharged

delegated functions of the Port Authority. The Port Authority in performing its statutory function delegated/licensed the ICD to perform the function of the Port Authority in providing storage facility. It is noted that the Customs Authority declares places as warehouse stations under Section 2(u) read with Section 11 of the Customs Act. The respondent No 7, ICD simultaneously performs the function of a State agency both under Chittagong Port Authority Ordinance as well as the Customs Act. The ICD cannot entertain vessels cargo in private capacity. The ICD cannot deliver cargo to any importer without any assessment and payment of the customs duties and taxes. The respondent No. 7 is an instrumentality of the Port Authority discharging the functions of the Port.

Furthermore, Mr. Ariff submits that after proper assessment of the Bill of Entry the importer's C&F Agent deposit duties, taxes, VAT etc. to the authorized bank. On the basis of such payment the concerned Principal Appraiser affixes the seal "The goods are out of Customs Control" which is known as "Out passing" of B/E. It is noted that Annexure-C to the Writ petition is the relevant printed release order but without the necessary endorsement that the goods are out of Customs control. The said document further reveals that the Chittagong Port Authority has not filled up and endorsed the release order. The respondents are, therefore, collectively responsible

to ensure delivery of the cargo without any impediment. No lien has been exercised upon the cargo under section 22 of the Chittagong Port Authority Ordinance, 1976. The respondents collectively, including respondent No. 7, are under an obligation to deliver the cargo to the Writ Petitioner.

His further contention is that admittedly and evidently the petitioner did not suffer any lien on his cargo for freight. The retired bank documents and the beneficiary bank establish that the freight was duly received by the beneficiary bank discharging the petitioner importer from any financial liability in respect of the cargo. The foreign judgment demonstrates litigation among the suppliers, wherein the petitioner is neither a party nor any claim against the petitioner has been laid.

Mr. Ariff submits that the shipping company as defendant No. 2 has laid claim against the suppliers in the suit before the New South Wales Court. However, the shipper in Australia failed to pay freight to MSC for the cargo, and therefore no Bill of Lading was released by MSC in respect of the cargo.

He finally submits that according to Annexure-G. The petitioner’s liability towards freight was discharged during the period 6 May-1 June 2010 when the payments were received by the

negotiating bank, i.e. National Australia Bank Ltd. The delay in delivering the cargo to the petitioner is patently and evidently due to unlawful withholding on the plea of non-payment of freight. The respondents collectively have exercised their statutory control over the cargo under the Port Act, 1908, Chittagong Port Authority Ordinance, 1976 and the Customs Act, 1969 and, therefore, are under a legal obligation to deliver the cargo free from any encumbrance including container/ICD charges after the petitioner-importer has discharged his obligations towards payment of custom duties, taxes and port dues.

The respondent No.4 Chittagong Port Authority (CPA) entered appearance and contested the writ petition by filing an affidavit-in-opposition. Mr. Imrul Kabir along with Farzana Ahmed appearing for the Respondent No. 4 submits that the payment of customs duty and other charges to the customs authority does not create any right to have an automatic delivery of any goods. Rather, obtaining a clearance certificate from the Customs Authority, which is a mandatory requirement to qualify to have the goods from the Chittagong Port Authority. In the present case the petitioner failed to provide any clearance certificate to the CPA. Therefore, it is the petitioner's inability that the goods are still laying at the private depot.

Mr. Imrul's next contention is that the petitioner never ever came to the respondent No.4 along with the necessary documents, especially 'out passed' Bill of Entry from the Customs Authority.

Finally, Mr. Imrul asserted that the note sheet in respect of the petitioner's file keept in its office shows that the petitioner never approved the respondent No.4 to take delivery of the goods in question.

The respondent No.6 entered appearance and contested the writ petition by filing an affidavit-in-opposition. Mr. Md. Ramzan Ali Sikder appearing for the Respondent No. 6 submits that Mediterranean Shipping Company or MSC, carried two consignments consisting of 80 containers of APH Wheat ("the cargo") from Sydney Australia to Chittagong Port, of which the petitioner was the importer, but the respective shippers at Australia failed to pay freight to MSC for the cargo, and therefore, no Bills of Lading were issued or released by MSC in respect of the cargo. Next, he submits that the original owner and supplier of the consignment in question 'Gilgandra Marketing Co-Operative Limited' as plaintiff filed legal proceeding in the Supreme Court, New South Vales, Australia against Australian Commodity & Merchandise Pty Ltd, MSC Mediterranean Shipping Company SA. NYK Line and MISC Berhad. The Australian Court by judgment and

order dated 22.3.2011 issued an order directing the MSC, the principal of the Respondent No. 6, to do all things that are necessary to deliver the wheat to or according to the direction of the plaintiff (Gilgandra Marketing Co-Operative Limited) and also permanently restrained Australian Commodity & Merchandise Pty Ltd from dealing with selling, encumbering, endorsing and Bill of Lading, issuing delivery order for delivering the cargo, containers and Bill of Lading of the wheat in question. Mr. Ramzan further submits that MSC still retains the original Ocean Bill of Lading and that MSC has nothing to do with the House Bill of Lading issued by the freight forwarder (Excalibur Logistics). With regard to the petitioner's payment against the House Bill of Lading, it is submitted that the petitioner and its bank, Bank Asia Limited, have done the same at their risk and responsibility and that this Respondent is not liable to deliver the cargo to the petitioner in this regard.

Mr. Ramzan finally submits that on the basis of the freight forwarder's House Bill of Lading, petitioner cannot claim the goods in question, as per L/C terms and conditions. Therefore, payment of Customs duty, VAT and other charges for the goods on 9.02.2011 to the Customs Authority cannot qualify the petitioner to have the release of the goods in question.

The kernel question in this Rule Nisi is whether the respondents individually or jointly holding the petitioner's goods in questions without lawful authority.

From the record it appears that the petitioner opened a Letter of Credit being No. 209610010034 dated 18.03.2010. The said Letter of Credit stipulates, inter alia, as under;

> 46A: (C) *"FULL SETS OF SHIPPED ON BOARD CLEAN NEGOTIABLE OCEAN BILL OF LADING MARKED FREIGHT PREPAID EVIDENCING SHIPMENT MADE TO THE ORDER OF BANK ASIA LTD. ANDERKILLA BRANCH, CHITTAGONG, BANGLADESH"*.
>
> 47A :(1) DOCUMENT WITH DISCREPANCY MUST NOT BE NEGOTIATED WITHOUT PRIOR APPROVAL OR L/C OPENING BANK.
>
> 47A: (6) *"STALE, CLAUSED, THROUGH, SHORT FORM B/L. BLANK BACK B/L FREIGHT FORWARDER B/L AND DOCUMENTS ARE NOT ACCEPTABLE."*
>
> 47A: (13) *"BENEFICIARY'S CIRTIFICATE CONFIRMING THAT ONE SET OF NON NEGOTIABLE DOCUMENTS HAS BEEN SENT TO DIRECTLY TO THE APPLICANT BY COURIER SERVICE WITHIN 7 WORKING DAYS AFTER SHIPMENT."*

But, the bill of lading dated 15.04.2010 submitted by the petitioner appears that the said bill of lading issued one Excalibur Logistics Sydney, Australia, as carrier, who is the freight forwarder engaged by the shipper. Clause 46 A: (C) of the Letter of Credit (LC) clearly state that the Bill of Lading would be 'OCEAN BILL OF LADING' and as per 47 A (6) of the Letter of Credit state that the Bill of Lading issued by the Freight Forwarders are not acceptable. So, the Bill of Lading produced by the petitioner in the case in hand is not a bill of lading as per L/C terms and condition.

Apart from that, Bill of lading issued by a forwarding agent which is neither the owner nor the charterer of the vessel. For this purpose it cannot matter whether the bill is issued in its own name or under an assumed or business name which conceals it identity.

In view of the above it is abundantly clear that in order to get delivery order from the carrier as well as for getting payment under the above L/C, it was mandatorily required to present "Ocean Bill of Lading" and none else. But in this case, admittedly, the petitioner produced House Bill of Lading-against which petitioner is not entitle to get any delivery of goods.

Scrutton, Charterparties, 19th ed (1984) at 2 describes a bill of lading as follows;

> *"After the goods are shipped, a document called a bill of lading is issued, which serves as a receipt by the shipowner, acknowledging that the goods have been delivered to him for carriage..... the bill of lading serves also as;*
>
> 1. *Evidence of the contract of affreightment between the shipper and the carrier.*
> 2. *A document of title, by the endorsement of which the property in the goods for which it is a receipt may be transferred, or the goods pledged or mortgaged as security for an advance.*
>
> *By statute, the rights and liabilities of the shipper under the contract of affreighment as set out in the bill of lading may be transferred with the full property in the goods to the consignee of the goods or the indorsee of the bill of lading."*

Therefore, a document is not a bill of lading merely because that is what the purpose called it.

From the statement by the editors of the 19th edition of Scrutton (at 384);

> "*A house bill of lading issued by a forwarding agent acting solely in the capacity in the agent to arrange carriage is not a bill of lading at all, but at most a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper. It is not a document of title, nor within the Bills of Lading Act, 1855 and it is unlikely that it would ever be regarded as a good tender under a cif-contract."*
>
> [Emphasis added]

In view of the above statement, a forwarding agent issuing to its customer a house bill masquerading as an ocean bill which did not protect the petitioner on the terms of bill of lading.

Under the UCP 600-Article 24 relates to bill of lading. A bill of lading, however named, must appeared to;

> *"a. A Road, rail or inland waterway transport document, however named must appear to*
>
> *i. indicate the name of the carrier and;*
> *-be signed by the carrier or a named agent for or on behalf of the carrier, or*
>
> *-indicate receipt of the goods by signature, stamp or notation by the carrier or a named agent for or on behalf of the carrier.*
>
> *Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent.*
>
> *Any signature, stamp or notation of receipt of the goods by the agent must indicate that the agent has signed or acted for or on behalf of the carrier.*
>
> *If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier.*

ii. indicate the date of shipment or the date the goods have been received for shipment, dispatch or carriage at the place stated in the credit. Unless the transport document contains a dated reception stamp, an indication of the date of receipt or a date of shipment, the date of issuance of the transport document will be deemed to be the date of shipment.

iii. indicate the place of shipment and the place of destination stated in the credit.

b. i. A road transport document must appear to be the original for consignor or shipper or bear no making indicating for whom the document has been prepared.

ii. A rail transport document marked " duplicate" will be accepted as an original.

(iii) A rail or inland waterway transport document will be accepted as an original whether marked as an original or not.

c. In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set.

d. For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance, within the same mode of transport, during the carriage from the place of shipment, dispatch or carriage to the place of destination stated in the credit.

e.i. A road, rail or inland waterway transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.

ii. A road, rail or inland waterway transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

In the present case transport document (petitioner submitted house bill of lading) neither signed by the carrier nor a named agent for or on behalf of the carrier. Rather, it was signed by the freight forwarder. Therefore, as per a (i) of the Article 24 of UCP 600, house bill of lading submitted by the present petitioner is not a bill of lading.

The definition of "Carrier" in Article 1 (a) of schedule of "The Carriage of Goods by Sea Act, 1925 merits reference here and read thus:-

Schedule

Rules relating to bills of lading

Article- I

Definitions

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say-

(a) "Carrier" includes the owner or the chatterer who enters into a contract of carriage with a shipper.

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charger party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

In the present case petitioner submitted an ocean bill of lading issued by EXCALIVOR LOGISTICS who is a freight forwarder and agent. Therefore, as per Article 1(a) of schedule of the Carriage of Goods Sea Act, 1925, EXCALIVOR LOGISTICS is neither an owner nor a chatterer of the vessel and had no authority to issue any bill of lading. So, the bill of lading placed by the petitioner was not a bill of lading as per Article-1 (a) of schedule of "The carriage of goods by Sea Act, 1925."

On the other hand Chittagong Port is the bailee of Import containers since receiving of those containers from vessel till the

delivery/disposal of such container. While the containers are stored in the port protected area Chittaong Port takes all types of safety and security measures to protect the containers till the delivery. There are different types of import containers arrive in Chittagong Port such as (1) Import FCL containers which are received in intact seal and stored in port protected area and port is liable to deliver it with intact seal, (2) Import LCL containers which are received in intact seal and unstuffed and the cargo stored in the Container Freight Station (CFS) or sheds inside port protected area, (3) Dhaka ICD bound containers which are received in intact seal and dispatched through Bangladesh railway to Dhaka Kamalapur ICD and (4) another type of containers carrying rice, wheat, mustard, animal feed, scrap, raw cotton, waste paper etc. which are not stored in port protected area and allowed to carry those container from vessel's hook point or port premises to Private Container Depot. The containers or containerized cargo subsequently delivered to the importer or to the Clearing & Forwarding agent (representative of importer) on the basis of customs clearance and Agent's delivery order after realizing the port charges.

The writ petitioner's containers carried wheat and that is why those containers did not store inside the port-protected area and allowed to transfer directly from vessel's hook point to private

container depot (M/S Esack Brothers Industries Limited Container yard), respondent No.7 as per manifest submitted by the respective Main Line Operator (MLO).

In this regard, Regulations For Working Of Chittagong Port (CARGO AND CONTAINER), 2001 runs as follows:

> *2. The documentary formalities involved during the stages from the arrival of the containers till the delivery.*
>
> *The documentary formalities for the containers which are discharged at vessel hook points on to the private depot operator's trailer and transferred those trailers from Chittagong port to private depot yard are as follows'*
>
> *2.1 Shipping agent declares in Import General manifest (IGM) the container number, seal number, name of cargo, importer's name, Private depot's name where the containers will be stored etc. and submits it to Chittagong Customs Authority and Chittagong Port.*
>
> *2.2 . Chittagong Port provided the container discharging permission to the nominated Berth Operator within 24 hours of vessel arrival at berth where the name of private depot as preadvised by shipping agent.*
>
> *2.3 Equipment Interchange Receipt (EIR) is generated for containers to be transferred from*

vessel's hook point or from port premises to private depot premises.

2.4 The importers nominated C&F agents observe the customs formalities to get out pass the delivery document for taking cargo delivery from private depot premises and after obtaining customs clearance C&F agent submits customs out passed document to CPA with agent delivery order which is verified at one stop service centre of CPA and related port charges are realised accordingly which makes the delivery document as ready to take cargo delivery. Importer's agent takes the delivery of cargo from private depot premises on submission of all related documents on payment of charges a/c off Dock. It should be noted here that unless and until the import documents are not out passed or released by the customs authority. Chittagong port and private depot operators do not hold the position to deliver the cargo to the concern importer.

[Emphasis added]

From the aforesaid provision it appear that the duty of the C&F agent of the importer is after completion of custom formalities to get out pass the delivery document and submits it before the CPA with related port charges.

But, in the present case no such ‘out pass’ produced before the CPA along with port charges. Therefore, how the petitioner wanted to get the delivery of his goods in question. Moreover, as per provision 2.4. of the regulations for working of Chittagong Port (CARGO AND CONTAINER), 2001 unless and until the import documents are not ‘out pass’ or released by the customs authority CPA and private depot operators do not hold the position to deliver the cargo to the concerned importers without customs clearance certificate, which CPA has no authority to allow delivery of the said goods.

From the records, we do not find any single scrap of papers whether the petitioner filed any application to get the cargo from CPA, so, how the petitioner said that the CPA refused the delivery of his goods.

It is also appears from the law and guiding principle of Chittagong port authority that depositing the customs duty and other charges to the custom authority does not itself mean automatic delivery the said goods. But, the petitioner is required to obtain a clearance certificate from the custom authority. In the present case, petitioner proved to fail to provide the clearance certificate to CPA and thereby, it is the petitioner’s responsibility and liability that the goods are still lying at the private depot.

In addressing, the question raised by Mr. Hasan Ariff whether any Australian court or whether seller can stop the order, directed the local agent not to hand over the goods to the petitioner reference is had of Chapter 5 of the Sale of Goods Act, 1930 relates to "Rights of unpaid seller against the goods." In this context we quote Sections 45 to 49;

45. (1) The seller of goods is deemed to be an "Unpaid seller" within the meaning of this Act-

(a)when the whole of the price has not been paid or tendered;

(b)when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid seller's rights

46. (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

(a) a lien on the goods for the price while he is in possession of them;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

[Emphasis added]

Unpaid Seller's Lien

Seller's Lien

47.(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:-

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery

48. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Termination of lien

49(1) The unpaid seller of goods loses his lien thereon-

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.
(b) when the buyer or his agent lawfully obtains possession of the goods;
(c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

Therefore, from the reading of the aforesaid sections it appears that a unpaid seller has lien on the goods for the price while he is in position of them and in case insolvency in transit and a right of the sale a right of withholding delivery and stoppage in transit. So

the unpaid seller may exercise his right of lien notwithstanding that he is possession on the goods.

In the present case the goods in question are being held by the respondents as agent or bailee for buyer. Section 51 of the Sale of Goods Act which runs as follows;

> *51.(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, untill the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.*
>
> *(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.*
>
> *(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further desitnation for the goods may have been indicated by the buyer.*
>
> *(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at end, even if the seller has refused to receive them back.*
>
> *(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.*
>
> *(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.*
>
> *(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.*

Therefore, it is evident from the record that as per Section 51 of the Sale of Goods Act the goods in question in transit. And as per Section 50 of the Sale of Goods Act, the unpaid seller has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

The petitioner's lawyer Mr. Ariff submits before the court that the petitioner has incurred huge loss and accordingly prays for compensation. In this regard Sales of Goods Act provides specifically in Chapter VI thus:

THE SALE OF GOODS ACT,1930

CHAPTER VI

SUITS FOR BREACH OF THE CONTRACT

55. (1) where under a contract of sale the property in the goods has passed to the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

56. Where the buyer wrongfully neglects or refuses to accept and pay for the buyer, the buyer may sue the seller for damages for non-delivery.

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to delier specific or ascertained goods, the Court may, if it thinks fit, on the application of plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

59. (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject other goods; but he may-

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and use for damages for the breach.

61. (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price-

(a) to the seller in a suit by him for the amount of the price –from the date of the tender of the goods or from the date on which the price was payable.

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller-from the date on which the payment was made.

Therefore, if the seller wrongfully neglects or refuses to deliver the goods to the buyer i.e. someone in the position of the present petitioner, then the petitioner, if he deems it necessary, can indeed take recourse of the law as referred to above. The findings above of this Court are necessarily confined to the facts unique to this case and predicated on documents as found on record.

In light of the above facts and circumstances, the relevant provisions of law and the observations and findings, we do not find any excellence in this Rule.

In the result, the Rule is discharged. There is no order as to cost.

Syed Refaat Ahmed, J:

I agree.