SRI LANKA PORTS AUTHORITY

v.

PIERIS

SUPREME COURT.
ISMAIL, J., SHARVANANDA, J. AND WANASUNDERA, J.
S. C. APPEAL No. 30/80—COURT OF APPEAL No. 156/76—D.C. COLOMBO 56938/M.
MARCH 16, 1981.

Port (Cargo) Corporation Act, No 31 of 1958, sections 4 (1) (a), 63 (1)—Demurrage—Whether a "port service" within meaning of section 4 (1) (a) or a "prescribed service" referred to in section 63 (1)—Powers vested in Minister to fix charges—Whether fixing of rates for demurrage ultra vires.

Supreme Court—Appellate jurisdiction—Power to correct all errors in fact or in law once leave to appeal granted—Exercise of such powers—Whether appellant may urge grounds not set out in his application for leave.

The plaintiff-corporation sued the defendant to recover a sum claimed by it as 'prescribed charges' recoverable on account of demurrage. Judgment was given for the plaintiff as prayed for in the District Court. But this judgment was set aside in appeal and the plaintiff's action dismissed and a counter claim by the defendant allowed. The Court of Appeal held that the plaintiff's claim to recover demurrage as 'prescribed charges' was untenable in law, upholding a contention of the defendant that the said sum could not be recovered as it was not a 'Port service' referred to in section 4 (1) (a) of the Port (Cargo) Corporation Act, nor a 'prescribed service' referred to in section 63 (1) of the Act. It was held that it was therefore ultra vires for the Minister to fix rates for demurrage by order under section 63 (1) as it was not a 'service' and the claim made by the plaintiff for demurrage on the basis of the charges so fixed by the Minister could not be maintained.

In the District Court there was also a finding of fact that the delay in unloading which resulted in demurrage being payble was due to the fault of the defendant-respondent, but the Court of Appeal reversed this finding and held that the plaintiff corporation was responsible for the undue delay and hence could not recover demurrage charges. Before the Supreme Court, counsel for the defendant-respondent took objection to this question being argued as it had not been raised in the application for leave to appeal.

Held

(1) The 'prescribed services' referred to in section 63 (1) are the 'Port services' prescribed in section 4 (1) of the Port (Cargo) Corporation Act. These 'services' involve, *inter alia*, the provision of cargo barges or lighters by the Corporation for the landing and discharging of cargo. It is not disputed that the Corporation is entitled to charge *hire* for the use of its lighters in connection with the performance of its 'Port services' and such *hire* can be determined not only with reference to the weight of the cargo but also with reference to the time that the plaintiff's lighters are engaged and detained in such 'service'. A 'service' of stevedoring and landing is not complete until the lighter containing the cargo is cleared by the consignee and default on his part in expeditiously clearing the cargo will result in the detention of the plaintiff's lighter.

(2) Accordingly it is legitimate and competent for the Corporation to charge the consignee for undue detention as incidental to the charges for the hire of its lighters. When the Minister provided for *demurrage* in the Gazette notification he imposed such charge as a charge for the prescribed port services provided by the plaintiff, calculated by the time involved in performing those services and he was entitled to do so. The charge for demurrage was not a charge for a separate 'Port service' but was an enhanced charge for the port service rendered by the plaintiff-corporation in terms of section 4 (1) computed on the basis of the extra time expended in the performance of its services consequent to the consignee's default in diligently clearing the cargo from the corporation's lighters.

Held further

On leave to appeal being granted under Article 128 of the Constitution the Supreme Court being seised of the appeal has jurisdiction to correct all errors in fact or in law committed by the Court of Appeal or by the Court of first instance. The Court, however, has the discretion to impose reasonable limits, such as refusing to entertain grounds of appeal not taken in the Court below. It will, however, exercise such discretion looking to broad principles of justice and will take judicial notice of a point which is patent on the face of the proceedings and discourage mere technical objections. Hence in the present case, the objection taken on behalf of the defendant-respondent to the plaintiff-appellant questions not raised in its application for leave to appeal to the Supreme Court cannot be sustained and the finding of fact by the trial judge that delay in unloading was attributable to the defendant-respondent must be restored.

APPEAL from a judgment of the Court of Appeal.

Nimal Senanayake, with *N. Talpawela*, *Miss S. M. Senaratne*, *Saliya Mathew* and *Mrs. A. B. Dissanayake*, for the substituted plaintiff-respondent-appellant.

H. L. de Silva, with *John Kitto*, for the defendant-appellant-respondent.

Cur. adv. vult.

May 20, 1981.

SHARVANANDA, J.

The plaintiff-appellant is a Corporation established under the provisions of the Port (Cargo) Corporation Act, No. 13 of 1958. The plaintiff filed this action against the defendant on two causes of action: The first cause of action was for the recovery of a sum of Rs. 8,624 alleged to have been the 'prescribed charges' recoverable on account of demurrage from the defendant-appellant, according to the account particulars filed with the plaint; the second cause of action was for the recovery of a sum of Rs. 586.24 for services rendered by the plaintiff-respondent in supplying and re-filling 229 gunny bags. After giving credit to the defendant for a sum of Rs. 2,500 deposited by him with the plaintiff, the plaintiff sought to recover the balance sum of Rs. 6,710.24 with legal interest from the defendant. The defendant filed answer denying the plaintiff's right to claim any sum by way of demurrage and pleaded that the delay, if any, in

unloading was due to slow, inefficient and unpunctual working and unloading of lighters by the plaintiff and counter-claimed a sum of Rs. 2,500 with legal interest being the money deposited by him.

Judgment was given for the plaintiff as prayed for with costs by the District Judge. But on appeal this judgment was set aside with costs and the plaintiff's action was dismissed and judgment entered for the defendant in a sum of Rs. 1,913.76.

The plaintiff has preferred this appeal from the judgment of the Court of Appeal.

The Court of Appeal held as untenable in law the plaintiff's claim for the recovery of the sum of Rs. 8,624 referred to in the first cause of action as being 'prescribed charges' on account of demurrage. It upheld the defendant's contention that the said sum could not be recovered as it was not a 'port service' referred to in section 4(1) (a) of the Port (Cargo) Corporation Act, No. 13 of 1958, nor was it a 'prescribed service' referred to in section 63(1). It held that it was *ultra vires* for the Minister to fix by order under section 63(1) rates for demurrage as it was not a 'service' and that therefore the plaintiff could not claim demurrage on the basis of the charges fixed by the Minister under section 63(1) of the Act and published in Gazette P1.

Section 4(1) of the Act reads as follows:

"It shall be the general duty of the Corporation—

(a) to provide in the Port of Colombo and in any other port that may be determined by the Minister by order published in the Gazette efficient and regular services (hereinafter referred to as 'port services') for stevedoring, landing and warehousing cargo, wharfage, the supply of water and the bunkering of coal and any other services incidental thereto; and

(b) subject to the provisions of section 2, to conduct the business of the Corporation in such a manner, and to make in accordance with the provisions of this Act such charges for services rendered by the Corporation as would secure that the revenue of the Corporation is not less than sufficient for meeting the charges which are proper

to be made the revenue of the Corporation, and for establishing and maintaining an adequate general reserve."

Section 63 provides as follows:

"1. The charges that may be made by the Corporation for prescribed services rendered by it shall be fixed, and may be revised from time to time, by order made by the Minister in consultation with the Board of Directors and published in the Gazette.

2. The charges that may be made by the Corporation for services which are not 'prescribed services' shall be fixed, and may be revised from time to time, by an officer authorised in that behalf by the Board of Directors."

S. Scharenguivel, the Chief Accountant of the plaintiff-corporation, stated in evidence that the claim for payment of demurrage was made under the schedule of charges fixed by the Minister by virtue of the powers vested in him by section 63(1) of the Act and published in Government Gazette No. 11,464 of 1st August, 1959, under Note 10 of the Notes of the Scheduie 'A' (P1). This Note reads as follows:

"Demurrage at the appropriate rate is payable by the consignee for detention of the lighter containing dangerous cargo, if the cargo is not cleared within 48 hours of such lighter arriving at the delivery point. It will not be the duty of the Corporation to inform the consignees of the time of arrival . . . . . Demurrage charges will apply in respect of other cargo after 72 hours."

Schedule 'A', Item 23, sets out the rate for landing and delivery of dangerous cargo, such as sulphur in bags at Rs. 16.50 per ton. It was admitted that the defendant had imported a consignment of 20,000 bags of sulphur and that the 'prescribed charges' in respect of same had been recovered from the defendant. The dispute between the parties relates to the liability of the defendant under Note 10 read with Schedule 'F' in Gazette P1 for the demurrage charges of Rs. 246.40 for every 24 hours or part thereof that the 80-ton lighter that was hired by the plaintiff-corporation was detained by the defendant.

Counsel for the defendant had successfully argued before the Court of Appeal that, while the notification in P1 fixing the rates for 'port services' under the various schedules was lawful, fixing rates to be charged for demurrage was *ultra vires,* as 'demurrage' was not a 'port service' but was a liability arising from delay in unloading or in taking delivery within a specified time. It was however the contention of counsel for the plaintiff-corporation that it was *intra vires* the Minister under section 63(1) to fix rates for demurrage payable for cargo on board the Corporation lighters.

Section 4 of the Act requires the plaintiff-corporation to provide efficient and regular services for stevedoring, landing and warehousing cargo and any other services incidental thereto. Section 63(1) empowers the Minister to fix by order the charges for 'prescribed services' rendered by the Corporation. In the scheme of the Act, when section 63(1) of the Act makes provision for "the charges that may be made by the Corporation for prescribed services rendered by it", the services referred to therein are, in my view, the 'port services' prescribed in section 4(1) of the Act. Section 4(1) specifies the 'port services' that are obligatory on the Corporation to provide. These include stevedoring and landing. "Stevedoring" means "loading or unloading of the of the cargo of a ship", and "stevedoring" is defined in section 80 of the Act to mean "the operations connected with the loading, discharging, shipping, trans-shipping and storing of cargo in the holds of , or on board, any vessel". These services involve, *inter alia,* the provision of cargo barges or lighters by the Corporation for the landing and discharging of cargo. The Corporation has to bring the cargo in the lighter to the delivery point and thereafter the consignee has to clear the cargo and release the lighter without undue delay. The service of stevedoring and landing is not completed until the lighter containing the cargo is cleared by the consignee. Default on the part of the consignee in expeditiously clearing the cargo will result in the detention of the plaintiff's lighter. Then the consignee will become liable for damages for such detention. 'Demurrage' generally signifies the agreed amount to be paid as compensation for undue detention beyond the stipulated time.

According to Note 10 of Schedule 'A' in P1, the time stipulated for the clearing of dangerous cargo is 48 hours, and in respect of other cargo 72 hours. The question canvassed in this case is

whether it is competent for the Minister, in the exercise of his power under section 63(1) of the Port (Cargo) Corporation Act, to provide for such demurrage. It is not disputed that the Corporation was entitled to charge 'hire' for the use of its lighters in connexion with the performance of its 'port services'. 'Hire' can be determined not only by reference to the weight of the cargo, but also by reference to the time that the plaintiff's lighters are engaged and detained in such service.

It is only when the cargo has been cleared by the consignee can it be said that the plaintiff has performed its stevedoring/landing services and is discharged from its obligations. Hence it is legitimate and competent for the Corporation to charge the consignee for undue detention as incidental to the charges for the hire of its lighters. When the Minister provided for 'demurrage' in the Gazette Notification P1, he imposed such charge as a charge for the prescribed port services provided by the plaintiff, calculated by the time involved in performing those services and he was entitled to do so. According to Note 10, 48 hours or 72 hours, depending on the nature of the cargo whether dangerous or non-dangerous, was deemed sufficient to clear the lighters of the cargo. The Defendant was lawfully charged at Rs. 16.50 per ton (Schedule 'A', Item 23 in P1). If by the default of the consignee greater time was involved in the performance of the port services, an additional charge of Rs. 246.40 for every 24 hours or part thereof that a lighter was engaged in discharging the cargo is levied. The additional charge was, in my view, not a charge for a separate port service, but was an enhanced charge for the port service rendered by the plaintiff-corporation in terms of section 4(1) computed on the basis of the extra time expended in the performance of its services consequent to the consignee's default in diligently clearing the cargo from the Corporation's lighters.

In my view the Court of Appeal was in error in holding that the Minister had acted *ultra vires* in fixing rates for demurrage. The provision respecting 'demurrage' in P1 represents a reasonable pre-estimate of the damages that will result from the detention of the plaintiff's lighters beyond the stipulated time. The defendant does not complain that the demurrage was excessive or penal. The defendant had prior notice by P1 of the amount of demurrage he would have had to pay for default on his part in expeditiously clearing the cargo. If the charges relating to demurrage are *intra vires*, then the schedule of charges fixed by P1 is not negotiable

and the amount can be recovered from the defendant, unless the defendant satisfies the Court that the plaintiff was responsible for the delay in clearance. In the circumstances, the Court of Appeal has erred in holding that it is necessary for the plaintiff to prove the actual amount of damages suffered by it on account of the delay attributable to the defendant in clearing the cargo.

The trial Judge has found as a fact that the delay in unloading was mainly due to the fact that the defendant did not have sufficient lorries available for the transport of the cargo. The Court of Appeal was not on the evidence of record justified in rejecting this finding of fact. The defendant was, in the circumstances, liable to pay the demurrage prescribed in the Gazette.

Counsel for the defendant submitted that the clause in Note 10 that it will not be the duty of the Corporation to inform the consignee of the time of arrival of the loaded lighter imposed great hardship on the consignee and is unreasonable. Though there would appear to be substance in the complaint, the validity of this complaint depends on the exigencies of the situation and the incidents of the port. However, in view of the finding of the trial Judge that the delay in unloading was mainly due to the fact that the defendant did not have sufficient lorries available for the transport of the cargo, this complaint loses its relevancy.

Counsel for the defendant-respondent took objection to the plaintiff arguing questions which were not raised in its application for leave to appeal to this Court. The Court of Appeal had granted leave to appeal to this Court on the ground that "substantial questions of law in regard to the Port (Cargo) Corporation Act are involved" Counsel for the respondent submitted that it was not competent for the plaintiff to urge before this Court grounds of appeal not set out in his application for leave. According to him, counsel for the appellant should be restricted to the contention that the imposition of demurrage charges in terms of the Gazette Notification in P1 was not *ultra vires* the Minister under section 63 of the Port (Cargo) Corporation Act. He strenuously urged that even if the contention of counsel for the plaintiff is upheld, that will not be a sufficient ground for reversing the judgment of the Court of Appeal, as that Court has held not only that the demurrage charges are *ultra vires* the Minister under section 63, but also that the Corporation was

responsible for the undue delay and hence could not recover demurrage charges.

Article 128(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka provides that an appeal shall lie to the Supreme Court from any final order or judgment of the Court of Appeal in any matter or proceedings, whether civil or criminal, which invloves a substantial question of law if the Court of Appeal grants leave to the Supreme Court *ex mero moto,* or at the instance of any aggrieved party to such matter or proceeding. Article 128(2) provides for the Supreme Court granting special leave to appeal to this Court.

Article 127 spells the appellate jurisdiction of this Court. The appellate jurisdiction extends to the correction of all errors in fact and/or in law which shall be committed by the Court of Appeal or any court of first instance. There is no provision inhibiting this Court from exercising its appellate jurisdiction once that jurisdiction is invoked. On reading Articles 127 and 128 together, it would appear that once leave to appeal is granted by the Supreme Court or the Court of Appeal and this Court is seised of the appeal, the jurisdiction of this Court to correct all errors in fact or in law which had been committed by the Court of Appeal or court of first instance is not limited but is exhaustive. Leave to appeal is the key which unlocks the door into the Supreme Court, and once a litigant has passed through the door, he is free to invoke the appellate jurisdiction of this Court "for the correction of all errors in fact and/or in law which had been committed by the Court of Appeal or any court of first instance". This Court, however, has the discretion to impose reasonable limits to that freedom, such as refusing to entertain grounds of appeal which were not taken in the court below and raised for the first time before this Court. This Court in the exercise of its discretion will, however, look to the broad principles of justice and will take judicial notice of a point which is patent on the face of the proceedings and discourage mere technical objections.

The question of law regarding the powers of the Minister to provide for demurrage charges according to prescribed rates looms large in the judgment of the Court of Appeal, and its view of the law has coloured its approch to the question of the defendant's liability for demurrage. Once the plaintiff-appellant succeeds in demonstrating the untenability of that view of the law, it is

entitled to proceed to demonstrate the impact of that misdirection on the appreciation of the evidence. Since it is competent for this Court to entertain an appeal on facts and to review the facts, the appellant should not be precluded by his failure to question the Court of Appeal's findings of fact from canvassing them here as the question of law on which leave to appeal was granted is decided in its favour; otherwise the appeal will be a futile exercise for him.

For the above reasons, this Court, though it does not ordinarily allow questions which are not indicated in the application for leave to appeal to be raised at the hearing of the appeal, granted counsel for the appellant the indulgence of making his submissions on the Appeal Court's conclusions of fact.

I set aside the judgment of the Court of Appeal and allow the appeal and restore the judgment of the District Court. The plaintiff-appellant is entitled to costs both of this Court and of the Court of Appeal.

ISMAIL, J.—I agree.

WANASUNDERA, J.—I agree.

Appeal allowed.