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THE TRUSTEES OF THE PORT OF BOMBAY

v.

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THE PREMIER AUTOMOBILES LTD.

August 26, 1980

[P. N. SHINGHAL & D. A. DESAI, JJ.]

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*Bombay Port Trust Act—Sections 61B and 87 para 2—Scope of—Plaintiff's machinery damaged in transit from docks to godown—Plaintiffs claimed damages from Board as bailee—Board claimed immunity for tortious acts of employees under para 2 of section 87—Liability of the Board—Non-contracted bailment—Nature of.*

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Section 4 of the Bombay Port Trust Act provides for the creation of a Trust Board. It is a body corporate with perpetual succession and can sue and be sued. Section 61A(1) charges the Board with the duty of carrying out the provisions of the Act. Section 61B provides that the responsibility of the Board for loss, destruction or deterioration of goods of which it has taken charge shall, *subject to the other provisions of the Act*, be that of a bailee under sections 151, 152 and 161 of the Contract Act, 1872 omitting the words "in the absence of any special contract", in section 151 of the Contract Act. Paragraph 2 of section 87 provides that the Board shall not be responsible for any misfeasance, malfeasance and nonfeasance of any employee appointed under this Act.

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A case containing machinery imported by the respondent was taken charge of by the Board upon its landing in the Bombay Port. While being transported by the Board's employees on a four-wheeler trolley to one of the sheds in the docks the case fell down and the machinery was badly damaged.

After carrying out a survey of the damage caused to the machinery, the respondents gave notice to the Board claiming a large sum as damages. Invoking the provisions of section 87 of the Act the Board denied all liability for the damage caused to the machinery.

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In the course of the trial of the plaintiff—respondent's suit the parties drew up certain "consent terms" which formed the basis of the decision at the trial and appeal. Summarising the finding of the consent terms the appellate court stated that (i) the trust Board admitted an element of negligence on the part of its employees; (ii) the employees, who were with the trolley at the time of the accident, were appointed under the Act and (iii) while the Board merely claimed that the persons accompanying its trolley were employees, the respondents claimed that they were employees as well as agents of the Board.

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The High Court came to the conclusion that the liability of the Board was that of a bailee. As regards the applicability of the provisions of paragraph 2 of section 87 on which the appellant relied the High Court was of the view that this provision related to a totally different subject with which section 61B was not concerned and, therefore, the provisions of that section did not

afford any protection to the Board and that since a master is always liable for the torts committed by his servants in the course of the employment the Board was responsible for the damage caused to the machinery by its employees in the course of their employment.

Allowing the Board's appeal

HELD: (1)(a) Section 61B makes it clear that the responsibility of the Board was that of a bailee under three sections of the Contract Act and no more. It was not the case of the plaintiff that there was a contract of bailment as contemplated by section 148 of the Contract Act. Since there was no such contract between the parties, neither section 151, nor section 152 or section 161 would have been attracted as such: nor would the provision in section 61B have been applicable in a case of contractual bailment. Even though there was no contractual bailment, the responsibility of the Board for the loss, destruction or deterioration of the goods was clearly that of a bailee subject to the reservations provided by the section. [539 A-D]

(b) The essence of bailment is possession. A bailment may arise even when the owner of the goods has not consented to their possession by the bailee at all. A bailment is not, therefore, technically and essentially subject to the limitations of an agreement and the notion of privity need not be introduced in an area where it is unnecessary to do so. It follows that a bailment may exist without the creation of a contract between the parties and it essentially gives rise to remedies which cannot be said to be contractual. That is why it is said that bailment is predominantly a tortious relation and that the two are fundamentally similar. Therefore, since the claim in the present case was not based upon a mere breach of statutory duty under section 61B but was based on the Board's liability as bailee, it was no other than by way of an action in tort. [539 F-H]

(c) It may be that section 61B has fastened certain obligations on the Board which in truth are not contractual because they did not rest on an agreement but which by virtue of the same section were to be treated as if they were so and were made the subject matter of liability under sections 151, 152 and 162 of the Contract Act. Such a relationship may well be called as one arising out of an implied contract. But that does not mean that an altogether new cause of action arises merely because a duty to take charge of the goods is cast on the Board. By the very nature of that relationship it was essentially a delictual obligation, a civil wrong for which the remedy is an action in damages and not by way of an action of breach of contract. [540 B-D]

(d) In casting a duty on the Board to take charge for the goods immediately upon landing, the Legislature took care to lay down and define the nature and extent of the liability which is set out in terms to be that of a bailee. It is well settled that non-contractual bailment is predominantly a tortious action. [541 A-B]

In the instant case the plaintiff's claim was founded not upon a breach of statutory duty under section 61B apart from tort but on negligence, malfeasance and nonfeasance and the acts of misconduct on the part of its employees. In short the claim was based on careless handling by the appellants when the case slipped and fell while it was being removed by them as bailees. [541C]

2(a) The words "any person" in section 87 include the Board. The benefit of the limitation prescribed in paragraph 1 of this section is available to other "persons" also. But unlike paragraph 1, the protection of paragraph 2 is not

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**A** extended to cover "any person" but is confined to the Board. Yet another and more serious restriction is that the Board is made responsible for the misfeasance, malfeasance or nonfeasance of only those of its employees who have not been "appointed under this Act" which means that the protection does not extend to any tortious act if it has been committed by an employee who has not been appointed under the Act. [542 A-D]

**B** (b) Section 21 empowers the Board to appoint employees whom it deems necessary and proper to maintain for the purposes of the Act. But that could not possibly include all the employees like artisans, porters, labourers etc., who under the proviso to the section "shall not be deemed to be within the meaning of this section." The protection which the Board enjoys is therefore confined to the tortious acts of the employees appointed under the Act. Therefore, the loss, destruction or deterioration of goods of which the Board has taken charge would clearly amount to the Board's responsibility under section 61B. **C** But section 87 paragraph 2 has its resonance in section 61B and *vice versa*. Both the sections are interconnected and have to be read together as a whole. [542 E-H]

**D** (c) The view of the High Court that the provisions of paragraph 2 of section 87 are upon a totally different subject with which section 51B is not at all concerned, runs counter to the clear provisions of the two sections if read together and is wholly unsustainable. It is section 61B which makes the responsibility of the Board for the goods of which it has taken possession subject to the other provisions of the Act. There is no occasion or justification for reading the clause regarding the subjection to the other provisions of the Act so as to exclude section 87 as if it were outside the Act. [543 B-E]

**E** (d) When the High Court, while interpreting the consent terms stated that it was admitted that those employees at whose hands the machinery suffered damage in the course of transport "were appointed under the said Act" it was a short and inevitable step for it to hold that the Board was entitled to be absolved of its liability for the acts of those employees by virtue of paragraph 2 of section 87. [543 H]

**F** (e) The liability of the master for the acts of his servants would not possibly arise in a case where the statute intervenes and provides in express terms that the master would not be responsible for any act of misfeasance, malfeasance or non-feasance committed by a special class of its employees. The omission on the part of the High Court to appreciate this aspect of the matter arose because it based its findings on the mistaken impression that it was concerned with the act of an ordinary employee of the Board and not a special category of employee referred to in paragraph 2 of section 87. The High Court also failed to notice that paragraph 2 of section 87 related essentially to acts of misfeasance, malfeasance and nonfeasance of only those employees who had been appointed under the Act, and, as such employees were very few, the restriction on the Board's liability was limited and confined quite substantially. [544D-F; 545 D]

**G** 3. Moreover, the so called statutory duty is not unequivocal and even assuming that it took the case outside the purview of the law of torts and made it an innominate obligation, that would not take the case out of the exception provided by paragraph 2 of section 87. Section 61B and section 87 are parts of the same statute. [546 B-C]

**H** *Gulam Hussain Ahmedali & Co. Pvt. Ltd. v. Trustees of the Port of Bombay*, 64 Bombay L.R. 670 overruled.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1282 of 1971. **A**

From the Judgment and Order dated 17-7-1978 of the Bombay High Court in Appeal No. 40/65.

*Dr. Y. S. Chitale, J. B. Dadachanji and K. J. John* for the Appellant. **B**

*Anil B. Diwan, Rameshwar Nath and Ravinder Nath* for the Respondent.

The Judgment of the Court was delivered by

SHINGHAL, J.—This appeal by certificate is directed against the judgment of the Bombay High Court dated July 17, 1970, by which it upheld the judgment of the trial court dated March 3, 1965, decreeing the suit of the plaintiffs-respondents for Rs. 35,000 and interest with a part of their costs. It so happened that although there was initially much controversy about the facts, the parties realised the futility of disputing some glaring facts and agreed to take a decision, even in the trial court, on what they once described as “interim consent terms”, but to which they have stuck all through. We shall refer to them in a while, after stating some of the facts on which both the trial and the appellate courts have placed reliance. That will bring out the significance of the “consent terms” and make them more intelligible. **C**

The Premier Automobiles Ltd, hereinafter referred to as the plaintiffs, imported 13 cases of machinery from Italy. Case No. 249, which is the subject-matter of the controversy before us, contained an internal grinding machine weighing over 3 tonnes. It arrived in Bombay on February 21, 1960, by S. S. Jalsilton Hall. The “Board”, constituted under section 4 of the Bombay Port Trust Act, 1879, for short the Act, was a body corporate with a perpetual succession and a common seal. It was called “the Trustees of the Port of Bombay” and could sue and be sued by that name. We shall, however, refer to it as “the Board” for that is how it has been referred to in the Act and the impugned judgment. Since the Board was charged with the duty of carrying out the provisions of the Act, and had, in particular, the duty, under section 61A(1) of the Act, to take charge immediately upon the landing of any goods, it took charge of case No. 249 also on its landing in Bombay on February 21, 1960. The Board has in fact filed document Ex. K to prove that the case was in a damaged condition when it landed on February 21, 1960, and that attention to that fact was drawn of the handling agents M/s. Scindia Steam Navigation Co. Ltd. It purports to be a contemporaneous. **D**

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A document. The case was placed on a four-wheeler trolley and was being carried to one of the sheds in the docks when it fell down and the machine contained in it was severely damaged. Several employees of the Board were in charge of the case and the trolley at that time.

B It is said that a survey of the damage was carried out at the instance of the plaintiffs, who then took delivery on February 29, 1960. They carried the case to their factory and had the machinery examined by another firm. That firm valued the machinery at Rs. 65,000 and the damage at Rs. 55,000. The plaintiffs gave a notice claiming Rs. 65,774.10. The Board denied the claim in their reply and alleged that the machinery was in a broken condition at the time of the landing and it was due to the damaged condition of the case that it slipped and fell from the trolley accidentally. They relied on the aforesaid report Ex. K and pleaded, further, that they were not liable because of section 87 and certain bye-laws of the Board.

D The controversy led to the suit which was instituted on August 19, 1960. We shall refer to the pleadings in their proper context to the extent they bear on the controversy before us. Issues were framed and the parties went to trial. They led "considerable" evidence, but during the course of the trial they drew up certain "consent terms" on October 7, 1964 and limited the trial to them. Those terms have formed the basis of the decision at the trial and in the appeal. It seems there was some controversy regarding the admissions contained in the consent terms, and we have accepted the interpretation concurrently placed on them by both courts. The appellate court has summarised its findings on paragraph II(b) of the consent terms as follows,—

F "The contents of this paragraph leave much to be desired. But three things are clear from this paragraph (1) that in deciding issue No. 1 (we are concerned with issue No. 2 now) the Court had to assume that there had been some misfeasance or malfeasance (there is no case of non-feasance anywhere pleaded) on the part of persons handling the case No. 249, that is to say, the employees of the Port Trust. In other words, the element of negligence on the part of the employees of the Port Trust was admitted. (2) It is also admitted that those employees were appointed under the said Act. (3) The defendants merely alleged that they were employees while the plaintiffs alleged that they were employees as well as the agents of the Trust and that this side issue will have to be decided."

H The High Court has given its interpretation of paragraph II(c) also in regard to the applicability of bye-law No. 82 to the benefit of the

Board, but it does not really matter in the view we have taken of the case in other respects. The High Court took note of the fact that the loss or damage to the goods was not pointed out by the plaintiffs or acknowledged by the Docks Manager before the removal of the goods from the docks with reference to bye-law No. 98. That court however noticed the fact that both parties had agreed that if damages were to be awarded, the amount thereof should be Rs. 35,000. As regards evidence, it was agreed that, except as indicated in the preceding terms of consent, no other evidence "hitherto" recorded would be taken into consideration in the future proceedings in the suit or for decision of the remaining issues. That led the High Court to observe that the parties somewhat narrowed down the controversy by confining it to the points of law, and the learned Single Judge decided the case only upon those points of law which were referred to in the judgment.

The High Court, in appeal, took the view that the principal and substantial point before it was the true scope and effect of section 61B and paragraph 2 of section 87 of the Act. It arrived at a number of conclusions with reference to those provisions, namely, that the plaintiffs founded their claim upon the breach of statutory duty under section 61B also, that the provision of paragraph 2 of section 87 was upon a totally different subject with which section 61B was not at all concerned, that the liability of the Board was that of a bailee, that a master or employer was always liable for all torts committed by the servant provided it was in the course of his employment and that any other view of paragraph 2 of section 87 would render the provision of section 61B nugatory. In reaching its conclusions the High Court relied heavily on its Division Bench decision in *Gulam Hussain Ahmedadi & Co. Pvt. Ltd. v. Trustees of the Port of Bombay*.<sup>(1)</sup>

We shall examine whether these conclusions of the High Court are correct and whether it was justified in upholding the judgment and decree of the trial court and dismissing the appeal.

The first point for consideration is whether the High Court was right in taking the view that "apart from the claim in tort, the plaintiffs also claimed for the breach of the Trusts' statutory liability under section 61B." In reaching that conclusion the High Court noticed the obvious facts that in paragraph II(b) of the consent terms the trial court was required to assume that there was some misfeasance, malfeasance or non-feasance of the persons handling case No. 249. The High Court also noticed the two further facts (i) that there were

(1) 64 Bom L. R. 670.

**A** three clear heads under which torts could be classified, and by using them in paragraph 2 of section 87 of the Act, "the Legislature provided for immunity of the Port Trust from torts committed by its employees", and (ii) that in so far as the plaintiffs' claim in tort was concerned there could be no doubt that "it would fall within the ambit of paragraph 2 of section 87 because misfeasance, malfeasance or non-feasance (was) specifically admitted". We have therefore to examine whether the plaintiffs in fact, or in substance, founded their claim on the alleged breach of the statutory duty under section 61B and, if so, what is its bearing on the suit.

**C** A reference to the plaint (paragraph 4) shows that the plaintiffs pleaded that case No. 249 arrived by S.S. Jalsilton Hall and that the Board took charge of it "in accordance with the provisions of the Bombay Port Trust Act, 1879 and the dock bye-laws framed thereunder." Then (in paragraph 5) the plaintiffs pleaded that after taking charge of the case, the defendants placed it on a trolley for removing it to their open shed, and that, while it was being so removed, "on account of careless handling by the defendants, the case slipped from the trolley and fell on the ground" and its machine was "entirely broken". While making that assertion, the plaintiffs categorically asserted that "the defendants moved the said case as aforesaid in their capacity as bailees thereof." This reference to the Board's responsibility was pleaded because section 61B provided that that would be the nature of the liability of the Board. The section clearly states as follows,—

**F** "61B. The responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge shall, subject to the other provisions of this Act and subject also in the case of goods received for carriage by railways to the provisions of the Indian Railways Act, 1890, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872, omitting the words 'in the absence of any special contract' in section 152 of the last mentioned Act."

**G** So if there was any loss, destruction or deterioration of the goods within the charge of the Board, its responsibility was that of a bailee under the three specific sections of the Contract Act, excepting of course the further provision about the omission of the words meant to exclude a special contract to the contrary in section 152 of the Contract Act and the relevant provisions of the Railways Act. The section thus makes it clear that, for purposes of the present case, the responsibility of the Board was that of a bailee under the three sections of the Contract Act, and no more.

It has to be appreciated that the subject-matter of contractual bailment has been dealt with in chapter IX of the Contract Act, and section 148 defines "bailment" to mean the delivery of goods "upon a contract". As it was nobody's case that there was any such contract between the plaintiffs and the Board in this case, section 151 (regarding care to be taken by the bailee), section 152 (regarding the absence of that responsibility after taking the necessary care), and section 161 (regarding responsibility when goods were not duly returned), would not have been attracted as such. Nor would the provision in section 61B that the aforesaid responsibility of the Board shall be "subject to the other provisions of this Act", have been applicable in a case of contractual bailment.

So even though there was no contractual bailment either according to the pleadings of the parties, or on the wordings of section 61B, the responsibility of the Board was of the nature aforesaid, as the bailee of the consignment by virtue of that section. In other words, in so far as the "responsibility" of the Board for the loss, destruction or deterioration of the goods of which it had taken charge was concerned, it was clearly that of a bailee, subject of course to the reservations provided by the section. What then is the nature of a bailment? It may be mentioned that we have gone through the pleadings and there is no justification for the view that the plaintiffs based their claim on the breach of a mere statutory duty of the Board under section 61B.

It is well settled that the essence of bailment is possession. It is equally well settled that a bailment may arise, as in this case, even when the owner of the goods has not consented to their possession by the bailee at all : *Palmer on Bailment*, 1979 edition, page 2. There may thus be bailment when a wharfinger takes possession of goods unloaded at the quay side : (1970)2 All E.R. 826. A bailment is not therefore technically and essentially subject to the limitations of an agreement, and the notion of privity need not be introduced in an area where it is unnecessary, for bailment, as we have said, arises out of possession, and essentially connotes the relationship between a person and the thing in his charge. It is sufficient if that possession is within the knowledge of the person concerned. It follows that a bailment may very well exist without the creation of a contract between the parties and it essentially gives rise to remedies which, in truth and substance, cannot be said to be contractual. That is why *Palmer* has made the assertion that "bailment is predominantly a tortious relation" (page 36), and the two are fundamentally similar.

It follows, therefore, that as the claim in the present case was not based upon a mere breach of statutory duty under section 61B of the

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A Act, and was based on the Board's liability as bailee, it was no other than by way of an action in tort.

B It may be that, as in the present case, certain obligations were fastened on the Board under section 61B of the Act which were not in truth contractual in as much as they did not rest on agreement, but which, by virtue of the same section, were to be treated as if they were so, and were made the subject-matter of liability under three sections (sections 151, 152 and 162) of the Contract Act. Such a relationship may well be called as one arising out of an implied contract. But that does not justify the view of the High Court that an altogether new cause of action arose merely because a duty to take charge of the landed goods was cast on the Board under section 61A(1) and the Board's responsibility for them was defined in section 61B. By the very nature of that relationship, which admittedly did not arise out of agreement between the parties, it was essentially a delictal obligation. It was a civil wrong, for which the remedy was an action in damages and not by way of an action for breach of contract, as it is no body's case that there was any such relationship between the parties. It may be that the obligation of the Board was of the nature of a quasi-contract, but that also would not justify the view that it arose merely because of the words of sections 61A and 61B, as a statutory obligation quite apart from the sources of origin of obligations defined by Salmond (on Jurisprudence), twelfth edition, page 452 as contractual, delictal, quasi-contractual and innominate. In fact as Halsbury has put it (third edition, Vol. 37, page 111) while dealing with the nature and elements of liability the position is as follows,—

F “Those civil rights of action which are available under English common law for the recovery of unliquidated damages by persons who have sustained injury or loss from acts, statements or omissions of others in breach of duty or contravention of *right imposed and conferred by law* rather than by agreement are rights of action in tort.”

(Emphasis supplied).

G Reference may also be made to Street on Torts, sixth edition, page 5, that an action for breach of a statutory duty is an action in tort. As has further been pointed out on page 6, there is no fixed catalogue of circumstances which alone and for all time mark the limit of what are torts. Speaking simply and generally the law of torts is concerned with those situations where the conduct of one party causes or threatens harm to the interests of the other party. As in this case H a duty was cast on the Board under section 61A to take charge of

the goods immediately upon landing, the Legislature took care to lay down and define the nature and the extent of that liability, which was set out, in terms to be that of a bailee. Palmer has ably brought out the nature of bailment vis-a-vis tort and has rightly reached the conclusion that non-contractual bailment is predominantly a tortious action.

It would thus appear that it was not the case of the plaintiffs in their pleadings that their claim was founded merely upon the breach of the statutory duty under section 61B of the Act, apart from tort. On the other hand, in their notice before the suit, the plaintiffs' case was based on negligence, malfeasance and non-feasance on the part of the Board's administration at the docks and/or the acts of misconduct on the part of its employees. As has been pointed out, in the plaint the claim was based on careless handling by the defendants when the case slipped and fell while it was being removed by them as bailees.

So when the action was by way of tort, and was, at any rate, rested on section 61B, it was necessary for the High Court to give full meaning to what that section provided and to give effect to paragraph 2 of section 87 if it had a bearing on that section as was canvassed at length all through the litigation.

We have extracted section 61B. It will appear that while it prescribes the responsibility of the Board for the loss, destruction (as in this case) and deterioration of goods of which it has taken charge, it expressly provides, further, that that responsibility shall be "subject to the other provisions" of the Act. The "other provisions" on which reliance was placed by the Board, was section 87. It will be enough to read the first two paragraphs of that section, for the arguments before us have been confined to paragraph 2. The two paragraphs read as follows,—

"87. No suit or other proceeding shall be commenced against any person for any thing done, or purporting to have been done, in pursuance of this Act, without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding.

The Board shall not be responsible for any misfeasance, malfeasance or non-feasance of any employee appointed under this Act."

It is not in dispute before us that the words "any person" at the opening of section 87 prohibiting the commencement of a suit

**A** or other proceeding against it (or him), include the Board. Section 4 of the Act in fact expressly provides that the Board shall be a body corporate and have perpetual succession and a common seal, and shall sue and be sued by its long name mentioned in the section. The term "person" has been defined in the General Clauses Act to include any company or association or body of individuals, whether incorporated or not. So the Board was a "person" within the meaning of section 87 and it was entitled to notice and the benefit of the limitation prescribed in paragraph 1. But that benefit is available to other "persons" also. Then comes paragraph 2, which expressly provides that the Board shall not be responsible for any misfeasance, malfeasance or non-feasance of any employee appointed under the Act. It has to be noted that, unlike paragraph 1, the protection of paragraph 2 is not extended to cover "any person" and is confined to the Board. Then there is another, and a more serious restriction, namely, that the Board shall be responsible as aforesaid for the misfeasance, malfeasance or non-feasance of only those of its employees who have not been "appointed under this Act". It does not therefore extend to any such tortious act if it has been committed by an employee who has not been appointed under the Act.

Not all the Board's employees are appointed under the Act. Thus a cross-reference to section 21, which deals with officers and servants of the Board, shows that the Board is required to prepare and sanction a schedule of the staff of employees whom they shall deem it necessary and proper to maintain for purposes of the Act. That could not possibly include all the employees of the Board, for the proviso to the section states that artisans, porters and labourers and mukadams of porters and labourers etc., and a person in temporary employment other than those who are in receipt of the specified monthly salary, "shall not be deemed to be within the meaning of this section". The protection which the Board enjoys is thus confined to the tortious acts of the employees appointed under the Act, while the Board is answerable for any such act committed by the vast majority of its lesser employees who do the main work of actually handling, loading, transporting, storing etc. of the goods handled on behalf of the Board in the exercise of its statutory powers. The protection is therefore very much restricted, in so far as the Board is concerned, and there is no reason why it should be denied to it where it is otherwise available by a direct and emphatic provision in the Act. The section is clear and categorical in providing that if any misfeasance, malfeasance or non-feasance is committed by any employee appointed under the Act, the Board shall not be responsible for it. Thus loss, destruction or deterioration of goods of which the

Board has taken charge, falling in one or the other of those three categories according to the facts and circumstances of each offending act, would clearly amount to the Board's responsibility under section 61B, but section 87 (paragraph 2) has its resonance in section 61B, and vice versa, so that the sections are inter-connected and have to be read together and as a whole.

The High Court, however, went to the extent of observing that the provisions of section 87 paragraph 2 are upon "a totally different subject with which section 61B is not at all concerned" and that was why it took the view that they could not possibly be held to control section 61B. The High Court went on to hold that in its opinion one and the same act may give rise to two liabilities, one for breach of statutory duties and the other for the commission of a civil wrong or a tort and that while section 61B provides for the former, paragraph 2 of section 87 provides for the latter and the two provisions do not overlap. No justifiable reason has been given for this view and, if we may say with respect, we find that it runs counter to the clear provisions of the two sections if they are read together, and is wholly unsustainable. It is section 61B which deals with and prescribes the responsibility of the Board for goods of which 'it has taken possession under the statutory duty' under section 61A, and it is that section, namely, section 61B, which makes that responsibility "subject to the other provisions of (that) Act". There is no occasion or justification for reading the clause regarding the subjection to the other provisions of the Act so as to exclude section 87 as if it were outside the Act.

So if it could be shown that the acts of misfeasance, malfeasance and non-feasance compendiously used at the trial and in the consent terms, were committed by any employee appointed under the Act, there is no reason why the Board should not invoke paragraph 2 of section 87 and successfully claim that it was not responsible for them.

A reference to paragraph II(b) of the consent terms clearly shows that issues Nos. 1 and 2, which related to the liability of the Board by reason of the provisions of section 87, were to be decided on the assumption that there was some misfeasance, malfeasance or non-feasance of the persons who handled the case in question and who according to the defendants were their "employees appointed under the Act" whilst who according to the plaintiffs were the employees and the "agents" of the defendants. As we have mentioned earlier, the contents of this part of the consent terms has been interpreted by the High Court to mean that while negligence on the part of the Board was admitted "it was also admitted that these employees were appointed under the said Act". When the High Court clearly reached that conclusion, it was a short and inevitable step for it to hold,

A further, that the Board was therefore entitled to be absolved of its liability for the acts of these employees by virtue of paragraph 2 of section 87. So here again the High Court fell into an error for which its judgment cannot be sustained.

B The High Court has tried to interpret paragraph 2 of section 87 with reference to the law which was in operation prior to the enactment of section 87 by an Act of 1879 for till then the ordinary law was in operation, and reference in that connection was made to *Barwick v. English Joint Stock Bank*.<sup>(1)</sup> There the law was stated as follows :

C “The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master’s benefit, though no express command or privity of the master be proved.”

D Reference has also been made by the High Court to Salmond on Jurisprudence that actual benefit to the master need not be shown in such cases. But what the High Court did not properly appreciate was that such a liability or responsibility of the master could not possibly arise in a case where the statute intervenes, and provides, in express terms, that the master shall not be responsible for any act of misfeasance, malfeasance or non-feasance committed by a special class of its employees. This omission of the High Court to appreciate the correct legal position with reference to the decision in *Barwick* (supra) and the text book relied upon by it, arose because it based its finding on the mistaken impression that it was concerned with the act of an ordinary employee of the Board and not the special category of employee referred to in paragraph 2 of section 87 of the Act, namely, the “employee appointed under the Act”. This mistake runs through the entire judgment and occurs at a dozen places where the question of tortious liability has been examined in regard to the action of an ordinary employee and the master’s vicarious liability for the same.

E Then the High Court went on to examine its decision in *Gulam Hussain’s case* (supra) and, while disagreeing with that portion of that judgment where the Division Bench had stated that the “scope and the effect of the second paragraph of section 87 is to protect the Board from vicarious liability which they might have otherwise incurred for the torts committed by their employees in the course of employment”, the High Court chose to follow the view taken in that judgment that the responsibility for the loss, destruction or deterioration of goods, which had been referred to in section 61B of the Act, was the direct responsibility of the Board itself and not that of any

(1) (1867) L.R. Vol. II 259 at 265.

of its employees. But we are constrained to say that in *Gulam Hussain's case*(<sup>1</sup>) also, the High Court referred only to the "employees of the Board and the torts committed by them in the course of their employment, but failed to notice that even though a duty was cast on the Board under section 61B for the loss, destruction or deterioration of goods of which it had taken charge, that responsibility was "subject to the other provisions of the Act", namely, section 87, paragraph 2 to which reference has been made by us at some length, and which expressly absolved the Board from responsibility for any misfeasance, malfeasance or non-feasance of any employee appointed under the Act. *Gulam Hussain's case* (supra) was therefore not decided correctly and as the High Court, in the impugned judgment, took the view that the conclusion reached in *Gulam Hussain's case* (supra) was binding on it, it naturally arrived at a decision with which we are unable to agree. The High Court failed to notice that paragraph 2 of section 87 related essentially to acts of misfeasance, malfeasance and non-feasance of only those employees who had been appointed under the Act, and as such employees were very few, the restriction on the Board's liability was limited and confined quite substantially. The High Court went further, and brought in the question and concept of the Board's "agents" even though it was quite foreign to paragraph 2 of section 87 and no evidence was relied upon to establish that it were the Board's "agents" who were responsible for the damage to the consignment. In fact, in *Gulam Hussain's case* (supra) the High Court presumed that if the Board was responsible for the loss, destruction or deterioration of the goods, the cause of action must be the failure of the Board to take the requisite degree of care by itself or through its agents, and not merely a tort committed by an employee for which the Board was sought to be held vicariously liable. With respect, we are unable to find any justification for such a view. *Gulam Hussain's case* (supra) was therefore not decided on a proper appreciation of the provisions of section 61B and paragraph 2 of section 87 of the Act. One of the Judges who decided that case was the Judge who tried the present case, and he naturally followed his own earlier judgment in *Gulam Hussain's case* (supra). As the Division Bench, which gave the present judgment (under appeal before us) in that very case held that the conclusion reached in *Gulam Hussain's case* (supra) was binding upon it, it fell into the error which had crept in the initial decision in *Gulam Hussain's case* (supra). *Gulam Hussain's case* (supra) is therefore no authority or basis for upholding the impugned judgment.

It has to be appreciated and remembered all through, that section 61B which imposes the responsibility on the Board for loss,

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**A** destruction or deterioration of goods of which it has taken charge, and states that that responsibility shall be that of a bailee under the three sections of the Contract Act, states further that the responsibility shall be "subject to the other provisions of (the) Act". So the so-called statutory duty is not unequivocal, and even if it were assumed that it took the case outside the purview of the law of torts and made it what Salmond has classified as an "innominate obligation", that would not take the case out of the exception provided by paragraph 2 of section 87. Sections 61B and 87 are both parts of the same statute, and must be read together—particularly when that is the clear direction of section 61B. By virtue of that section, the liability of the Board is no more than that of a bailee under sections 151, 152 and 161 of the Contract Act. As we have pointed out, bailment is a concept correlated to possession, and when that is admittedly not contradicted in this case, it is really a liability in tort and the so-called liability under section 61B of the Act means no more and no less than this.

**D** The High Court has observed that any other view would "virtually render the provisions of section 61B largely nugatory". But the very next sentence gives out the reason for that view, for the High Court has gone on to observe that that would be so if paragraph 2 of section 87 is construed otherwise, namely, that "for any and every misfeasance, malfeasance or non-feasance of its employee, the Board is given complete immunity." That, however, is not what section 61B and paragraph 2 of section 87 provide for, as we have pointed out earlier, only a very few of the Board's employees are appointed under the Act and all that the paragraph provides is that the Board shall not be responsible for any misfeasance, malfeasance or non-feasance on the part of only those employees. They may, for aught one knows, be responsible personally for what they do, but it is not a correct proposition of law to say that the view which has found favour with us would virtually render the provisions of section 61B "largely nugatory".

**G** In the view we have taken, it is not necessary for so to examine the validity of the bye-laws to which reference has been made by the High Court. They were produced before us towards the close of the hearing, for the arguments proceeded and were based on the true meaning and construction of sections 61B and 87 (paragraph 2) and it was agreed that our decision thereon would govern the fate of this case. We should not therefore be taken to have expressed any opinion about the validity of the bye-laws in question. It will be sufficient for us to say that the decision here or below will not be conclusive of

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their validity or invalidity for purposes of the present case or like controversy.

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In the result, the appeal succeeds and is allowed. The judgment and decree of the High Court are set aside and the suit is dismissed. In the circumstances of the case, the parties shall pay and bear their own costs throughout.

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*Appeal allowed*

P.B.R.

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