

A M/S TRANSPORT CORPORATION OF INDIA LTD.

v.

M/S GANESH POLYTEX LTD.
(Civil Appeal No. 1427 of 2007)

NOVEMBER 05, 2014

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[J. CHELAMESWAR AND A.K. SIKRI, JJ.]

Consumer Protection Act, 1986 – s. 21(a)(i) – Complaint under – By the exporter of goods – Against the transporter – Complaint allowed by National Commission directing the transporter to make payment to the exporter with interest – Held: Since the transporter admitted entrustment of goods by the exporter, the burden to prove that it (transporter) satisfactorily discharged his legal obligation to deliver the goods, is on the transporter, which burden, it failed to discharge – Hence, National Commission rightly allowed the claim of the exporter – Customs Act, 1962 – ss. 41, 74 and 75 – Shipping Bill and Bill of Export (Form) Regulations, 1991 – Reg. 3 – Export Report (Form) Regulations, 1976 – Reg. 4 – Evidence Act, 1872 – s. 78 – Customs, Central Excise, Duty and Service Tax Drawback Rules, 1995.

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Dismissing the appeal, the Court

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HELD: 1. Import and export of goods into or out of India is regulated by the Customs Act, 1962 and the Rules and Regulations made thereunder. The appellant, who claims to have exported 4 of the 5 consignments handed over to it by the respondent, could not have loaded the goods at Petrapole Customs station without having obtained a BILL OF EXPORT duly passed by the proper officer and the person-in-charge of the conveyance owned by the appellant could not have either loaded the goods in the vehicle or departed from Petrapole Customs

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station without delivering to the proper officer an EXPORT REPORT in the prescribed form contemplated under Section 41 of the Act. The best proof of the case of the appellant that it had in fact transported the goods in dispute beyond the Petrapole Customs station and out of the customs frontier of India would have been to produce the BILL OF EXPORT and EXPORT REPORT pertaining to the four consignments in dispute. [Paras 29, 38 and 39] [110-H; 111-A; 113-E-F; 114-A-C]

2. Unloading of imported goods at any customs station in India is also regulated by the provisions of the Customs Act, 1962. The appellant did not plead as to what is the procedure prescribed under the law of Bangladesh for the unloading of the imported goods at its Customs Stations? Nor did the appellant give the details of the dates of the actual delivery of each of the 4 consignments at Bengapole. It is a settled principle of private international law that foreign law is always a question of fact which is required to be pleaded and proved by the party whose rights or obligations flow from such foreign law. There is no pleading or proof in this regard in the instant case. [Paras 41 and 42] [115-A-D]

3. The defence of the appellant based on the letter dated 10.04.2002 that the appellant had delivered four consignments entrusted to it by the respondent at the Benapole Customs Station, Bangladesh cannot be accepted. The document (letter dated 11.04.2002) purports to be the internal correspondence between the two officers of the Customs department of Bangladesh, purportedly with a copy marked to the appellant. There is no pleading explaining the occasion for such a correspondence. The proof of public documents is required to be made in the manner specified under Section 78 of the Evidence Act. There is nothing on record to establish that the abovementioned letter has

A been duly proved in accordance with Section 78 of the Evidence Act. [Paras 45, 46 and 47] [117-E; 118-A-B,G-H]

B 4. In the present case, it is not clear from the pleadings of the appellant whether the respondent claimed a drawback either under Section 74 or under Section 75 of the Customs Act. In either case, the right to a drawback accrues to the exporter once the exporter makes an entry for export of the goods under Section 50 of the Act and on the making of an order by the proper officer under Section 51 permitting clearance and loading of the goods. A duty drawback does not necessarily lead to the inference that the appellant had duly delivered the goods in question at Benapole Customs station. [Paras 51 and 52] [121-B, C, G, H]

D 5. In view of the fact that the appellant admitted the entrustment of goods by the respondent to the appellant for transportation to Benapole (Bangladesh), the burden to prove that the appellant satisfactorily discharged his legal obligation to deliver the goods at Benapole (Bangladesh) in accordance with law is on the appellant which burden the appellant failed to discharge. Therefore, the National Commission rightly allowed the claim of the respondent. [Para 54] [122-C-D]

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1427 of 2007.

From the Judgment & Order dated 20.12.2006 of the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 341 of 1993.

G Jayant Bhushan, Madhvi Diwan, Rishi Maheshwari, P.S. Sudheer for the Appellant.

H A.N. Haksar, Rajeev K. Virmani, Rashmi Virmani, Sandeep Narain, Mukta Dutta, Jyoti Prakash, Narain & Co. for the Respondent.

TRANSPORT CORPORATION OF INDIA LTD. v. 101
GANESH POLYTEX LTD.

The Judgment of the Court was delivered by

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CHELAMESWAR, J. 1. This is an appeal under Section 23 of the Consumer Protection Act, 1986 against the order dated 20th December, 2006 of the National Consumer Disputes Redressal Commission (for short "the National Commission") in Original Petition No. 341 of 1993. The opposite party/respondent in the above-mentioned original petition is the appellant herein. The sole respondent herein was the complainant before the National Commission.

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2. By the impugned Order, the National Commission allowed a complaint filed by the respondent herein and directed the appellant herein to pay an amount of Rs. 29,74,321.45 with interest @ 12 per cent per annum from the date of the filing of the complaint till the date of realization apart from the cost quantified at Rs.25,000/-.

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3. The substance of the complaint before the National Commission is as follows:-

4. Both the parties to the complaint are public companies under the Companies Act. The respondent is engaged in the business of manufacturing and selling of yarn and export of fabric of different specifications, whereas the appellant is engaged in the business of transporting goods from one place to the other for consideration.

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5. In the year 1992, the respondent received an indent for export of 100 per cent cotton yarn fabric specified therein, the details of which are not necessary for the purpose of this judgment. The said indent was placed by one M/s. Aleef Enterprises (Trading), Dhaka calling upon the respondent to export the goods specified in the indent to M/s. Azim Garments Ltd. in Dhaka, Bangladesh.

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6. According to the complaint, the respondent was required to dispatch the entitled goods and "negotiate various

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A documents including invoice, consignment copy of the goods received and consignment note bill of exchange etc.” through M/s. Islami Bank Bangladesh Ltd., allegedly, the banker of M/s. Azim Garments Ltd., Dhaka¹.

B 7. The respondent averred in the complaint that it had agreed to send the various documents to be negotiated with the said Islami Bank and acceptance by the respondent’s banker i.e. the American Express Bank Ltd. It is further stated in the complaint that the said Islami Bank was entitled to take delivery of the goods or endorse the consignee copy of the goods receipt/consignment note in favour of M/s Azim Garments Ltd.²

C 8. The respondent entrusted five consignments of goods to the appellant on various dates, the details of which are as follows:-

Invoice No.	Date	Qty in Mtrs.	Amount US \$	Consignment Note No.	Date
EXP/2	28.10.92	13982	18176.60	A 08465	28.10.92
EXP/3	05.11.92	25109	32641.70	A 08565	05.11.92
EXP/4	14.12.92	12208	15870.40	A 08658	16.11.92

F 1. Para 3 of the Complaint: In terms of the said indent, the complainant was required to dispatch the quantities of the said goods and to negotiate various documents including the invoice, consignee copy of the goods receipt/consignment note, bill of exchange etc., and other documents of dispatch through M/s. Islami Bank Bangladesh Ltd., the bank of the said M/s. Azim Garments Ltd.

G 2. Para 3 of the Complaint: The said documents were agreed to be sent to the said Islami Bank Bangladesh Ltd., for negotiation and acceptance by American Express Bank Ltd., the bank of the complainant. The said Islamic Bank Bangladesh Ltd. upon acceptance for payment of the said documents including the bill of exchange for the price of the goods consigned, was entitled to either take delivery of the consignment of the said goods itself or endorse the consignee copy of the goods receipt/consignment note in favour of M/s Azim Garments Ltd.

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EXP/5	30.01.93	16188	21044.60	A 98738	29.12.92
EXP/6	25.02.93	5447	7081.10	A 11351	15.02.93
			94814.20		

— Para 4 of the complaint

9. Under the consignment note, the said goods were required to be transported from Ahmedabad to Benapole in Bangladesh. The CONSIGNEE COPIES of the consignment notes of each of the five consignments mentioned above were handed over to the respondent. It is admitted in the complaint that the goods which are the subject matter of the above-mentioned five consignments are required to be delivered upon the production of the consignee's copy of the respective consignment notes.³

10. According to the respondent, all the relevant documents including the CONSIGNEE COPIES of the consignment notes were duly communicated by the respondent through its banker to the Islami Bank Bangladesh Ltd. It is specifically averred in the complaint that the said transaction was originally covered by letter of credit opened by the said Islami Bank but the said letter of credit had expired. Therefore, the documents mentioned above were sent to the said banker on collection basis.⁴

3. Para 4 of the Complaint: The complainant from time to time entrusted the Respondent with various quantities of the said goods for transportation from Ahmedabad to Benapole in Bangladesh. The Respondent after collecting the freight, issued its consignment notes. The consignee copies of the respective consignment notes were handed over to the complainant and the goods covered by each consignment note were to be delivered and could be taken delivery of upon production of the consignee copy of the respective consignment note only and not otherwise.

4. Para 5 of the Complaint: All the documents including, inter-alia, the invoice, the consignee copies of the consignment notes and the bills of exchange, were duly sent by the Complainant through American Express Bank Ltd. to Islami Bank Bangladesh Ltd. for acceptance for payment. The said documents, although drawn under a letter of credit opened by the said Islami Bank Bangladesh Ltd., were sent on collection basis as the said Letter of Credit had expired.

A 11. It appears from the complaint that the Islami Bank
 Bangladesh, though received all the documents sent by the
 respondent, did not honour the same and made no payment
 for a long time. In the said circumstances, the respondent
 through its banker recalled all the documents "in order to re-
 B import the goods back to India". Admittedly, the said documents
 were returned unpaid by the Islami Bank Bangladesh to the
 complainant's banker.⁵

C 12. Upon the return of the original documents by the Islami
 Bank, the respondent herein, by its letter dated 12th July, 1993,
 called upon the appellant to "rebook all the five consignments:
 for transportation to New Delhi and deliver the same to the
 complainant at New Delhi". (Para 10 of the Complaint)) In
 response to the said letter, the appellant herein, by its letter
 dated 22nd July, 1993, assured the respondent that all the five
 D consignments would be rebooked for delivery at New Delhi. The
 appellant further called upon the respondent "to surrender the
 original consignee copies alongwith the invoice copies and pay
 one side freight and octroi at its Ahmedabad office for
 rebooking".

E 13. In reply to the letter dated 22nd July, 1993 of the
 appellant, the respondent, by its letter dated 31st July, 1993,
 called upon the appellant to confirm *inter alia* "that the goods
 covered under the said consignment note were available with
 the respondent and the location of the said goods". The
 F appellant replied by its letter dated 16th August, 1993 without
 giving any information demanded by the respondent but only
 gave assurance that the goods would be delivered within fifteen
 to twenty days "after the receipt of the original consignee
 G copies".

14. On 28th August, 1993, the respondent sent another

H 5. Para 8 of the Complaint: Thereafter, the said documents of the aforesaid
 five consignments were duly returned unpaid by the said Islami Bank
 Bangladesh Ltd. to the Complainant's bank under cover of their letter dated
 16.6.93.

letter seeking unequivocal answers to the various enquiries made by the respondent in its earlier letter dated 22nd July, 1993. A

15. In reply, the appellant, by its letter dated 11th September, 1993, confirmed that all the aforesaid consignments were lying at the godown in safe and sound condition and further confirmed that upon receipt of the original consignee copies, the said goods would be rebooked to New Delhi. The relevant portion reads as follows: B

"Sub.: Ch.No.A-08465 dated 28.10.1992 C
Ch.No.A-08565 dated 05.11.1992
Ch.No.A-08658 dated 16.11.1992
Ch.No.A-098738 dated 29.12.1992
A-11351 dated 15.02.1993
All Ex. Ahmedabad to Benapole D

We have received your letter no.RKV/M-889 dated 28th August, 1993 for rebooking of above consignments.

We have already given you two letters for advising your clients to deposit the original consignee copy and one side freight and other dues then only we will rebook the above consignments. But, you are asking for the confirmation referred in your earlier letter in paras 1(a) and (b). E

Please note that the above consignment is lying at our godown in safe & sound condition. When your client will send the D/D for our dues with original consignee copy to our Ahmedabad or Calcutta office then our concerned office will advice to Benapole to rebook the material to Delhi as per your advice. You are giving unnecessary correspondence and due to this long delay the demurrage is going on higher side day by day @ 3 paise per kg. per day. F G

We hope, you understood all the points and take necessary action immediately." H

A 16. The said letter was followed by another letter of the appellant dated 29th September, 1993, the relevant portion reads as follows:

“Sub.: Ch.No.A-08465 dated 28.10.1992

Ch.No.A-08565 dated 05.11.1992

B Ch.No.A-08658 dated 16.11.1992

Ch.No.A-098738 dated 29.12.1992.

A-11351 dated 15.02.1993

All Ex. Ahmedabad to Benapole

C This has reference to our earlier letter no.SBD/OPN/INM/3569/93 dated 11th September, 1993 regarding above consignments.

D As per the reply received from our Calcutta office, first four consignments have already been exported and the documents were sent to the party directly.

E The last consignment i.e. Ch.No.A-11351 is lying at our Calcutta Godown. If you want to rebook this consignment to Delhi, you please send the original consignee copy and our dues by D/D to our Ahmedabad or Calcutta Office directly for their necessary action. On receipt of Consignee copy and D/D, our Calcutta office will rebook this consignment to Delhi.”

F 17. In the background of the abovementioned facts, the respondent herein filed a complaint under Section 21(a)(i) of the Consumer Protection Act, 1986 before the National Commission in Original Petition No.341 of 1993 claiming various amounts totaling to Rs.40,98,164.04 along with pendent-lite interest and future interest @ 21% per annum on G Rs.34,74,321.45 along with costs.

H 18. In response to the said complaint, the appellant herein filed its written statement wherein it admitted the fact that five consignments of goods under five distinct consignment notes (as specified in the complaint) were entrusted to the appellant

for being transported from Ahmedabad to Benapole (Bangladesh). According to the appellant, of the abovementioned five consignments, four consignments were infact delivered. The relevant portion of the appellant's written statement reads as follows: A

"The opposite party duly cleared the consignments at Indo-Bangladesh border from Indian Customs and as per export procedure duly handed over the same to the Bangladesh Custom Officer which duly acknowledged the receipts of the said 4 consignments." B

19. It is further the case of the appellant that the fifth consignment was not exported to Bangladesh in view of the fact that the respondent herein had instructed the appellant to rebook the same to Delhi.⁶ C

20. It is the case of the appellant that as per the export procedure, the goods (which are the subject matter of dispute) were required to be unloaded and delivered at the Benapole Customs frontier of Bangladesh after crossing the Indian border at Petrapole. The relevant portion of the written statement, at para 4, reads as follows: D

"The subject consignments were meant for carriage by lorry transport from Ahmedabad/Odhav to Benapole (Bangladesh) and as per export procedure and or as customary said goods were to be unloaded and delivered after crossing India border at Petrapole into the warehouse of Bangladesh customs at Benapole. The importer consignee was to take delivery of the said goods after E

6. The goods covered by the consignment note No.A-11351 could not be exported to Bangladesh as in the meantime the opposite party having received instructions to rebook the same. The same consignment is lying in the godown of the opposite party at Calcutta entirely at the risk and responsibility of the complainant and incurring day to day demurrage charges. The opposite party was and still is ready and willing to deliver the goods covered by the consignment note No.A-11351. F

A paying the customs duties after complying with the formalities as per rules of the Bangladesh Customs Import and on submission of relevant documents to Bangladesh Customs Authorities at Benapole. The opposite party's obligation was to transport the said goods by their lorry and to deliver the same to the Benapole Bangladesh Custom Warehouse as per prevalent procedure of exporting the materials to beanpole (Bangladesh) from India. The opposite party duly transported the said four consignments and delivered the same at Benapole."

C 21. Coming to the letter dated 11.9.1993 of the appellant whereunder (according to the respondent) the appellant agreed to rebook the five disputed consignments to Delhi, it is the defence⁷ of the appellant that (a) the said letter only explained the procedure for rebooking of the consignments, and (b) the admission regarding the custody of the five consignments was a mistake of fact in view of the communication gap between the appellant's headquarter and its various branch offices. Within a short period after delivering the letter the appellant realized its mistake and explained its position by subsequent letter dated 29.9.1993 (the contents of which have already been extracted earlier).

F 22. It is further the defence of the appellant that once the goods crossed Indian customs frontier during the course of export of such goods, only the exporter can bring back the goods by following the procedure under the law⁸.

G 7. The opposite party states that by its letter dated 22.7.93 it never assured to rebook all the five consignments for delivery at Delhi to the complainant as alleged. On the contrary, the opposite party by its letter dated 22.7.93 explained the procedure for rebooking of the consignments by the consignor concerned. Thereafter, on thorough enquiry from its concerned branch offices the opposite party by its letter dated 29.9.93 duly informed the complainant that the goods covered by the four consignment notes were exported and delivered at the destination in terms of contract of carriage.

H 8. The complainant is also well aware of the fact that there is no 'Trade treaty' between India and Bangladesh for rebooking of the consignment by the transporter against the consignment notes issued in India. Only the

23. The appellant also took a defence that the respondent availed the duty drawn back credit under the Customs Act on the strength of the fact that the goods in dispute had been exported. Therefore, it is not open to the respondent to complain that the appellant has either misappropriated the goods or made a wrong delivery.⁹

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24. In support of its defence, the appellant relied upon three sets of documents i.e. Annexures X, Y and Z, running into 8, 2 and 6 pages respectively. Annexure 'X' consists of copies of four invoices and copies of four consignment notes covering four consignments of goods in dispute.

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25. The National Commission recorded a finding that the copies of the invoices produced under Annexure 'X' by the appellant herein and the copies of the invoices filed by the complainant do not tally with each other and, therefore, the documents produced by the appellant herein are "bogus".¹⁰

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Exporter can through his Clearing Agent at Bangladesh re-import the exported consignments according to 'back to India Bangladesh Customs procedure'. ... After exporting the consignments to Bangladesh it is the owner of goods who after completing all the formalities can clear the consignments from Bangladesh Customs and it is only then the same can be brought back to India. The opposite party as a carrier cannot of its own bring back the exported consignments in its country under the Law.

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9. The complainant being fully aware of the fact that the said 4 consignments were duly delivered at beanpole (Bangladesh) in terms of contract of carriage duly applied for duty drawback as provided under Section 74/75 of Customs Act, 1962 which is export-oriented benefit given by the Government of India.

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10. Reading of two sets of invoices together would show that the number of cartons, measurement of fabrics and dates as recorded in invoices at pages 61, 63, 65 and 67 are substantially different from the invoices at pages 15, 18, 21 and 24 for which no satisfactory explanation has been offered by the opposite party. Also considering the submission referred to above advanced by Shri Virmani, the invoices filed by the opposite party must be held to be bogus and they cannot be exhibited and read in evidence.

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A 26. The National Commission also examined two letters dated 08.04.2002 and 10.04.2002. These two letters were sent by the Customs authorities of Petrapole, Kolkata and Benapole (Bangladesh) respectively in response to the letters dated 14.03.2002 and 12.03.2002 respectively of the appellant. The
 B National Commission recorded a finding, "therefore, neither these two letters nor the endorsements and seals of Cargo Officer alongwith signatures on said invoices or the statement of Mahafuzur Rehman are of any help to the opposite party on the controversy on hand". The Commission, therefore, allowed
 C the complaint. The operative portion of the order is as follows:

"Complainant is thus entitled to the value of consignments in question of Rs.29,73,321.45 alongwith interest thereon which we quantify at 12% p.a. from the dates of booking upto the date of filing complaint and pendentilite and future
 D interest at the said rate from the opposite party. Since interest has been awarded to the complainant it is not entitled to any damage separately.

Accordingly, the complaint is allowed and opposite
 E party is directed to pay Rs.29,74,321.45 with interest @ 12% p.a. from the dates of book upto the date of filing complaint and pendentilite and future interest at the said rate. Opposite party will also pay Rs.25,000/- as costs."

F 27. Hence, the appeal.

28. Elaborate submissions are made by the learned senior counsel appearing for either side in support of their respective cases virtually reiterating their respective pleadings.

G 29. Since the case arises out of a contract for transport of goods by the appellant to a foreign country, an examination of the relevant provisions of the Customs Act, which deal with export of goods, is necessary. Import and export of goods into or out of India is regulated by the Customs Act, 1962 and the

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Rules and Regulations made thereunder. Section 50¹¹ of the said Act stipulates that the exporter of any goods by land is required to make an entry¹² thereof by presenting to the proper officer BILL OF EXPORT¹³. Under Section 51, the proper officer on receipt of a BILL OF EXPORT (contemplated under Section 50) if satisfied that the exporter has paid the duty and other charges under the Act, if any, and that such goods are not prohibited goods, may make an order permitting clearance and loading of the goods for exportation. A B

30. Under Section 40, a person-in-charge of a conveyance is not permitted to load export goods at a customs station unless a BILL OF EXPORT duly passed by the proper officer has been handed over to the person-in-charge of the conveyance by the exporter. C

31. The relevant portion of Section 40 reads as follows: D

"40. Export goods not to be loaded unless duly passed by proper officer.—The person-in-charge of a conveyance¹⁵ shall not permit the loading at a customs station—

11. Section 50. Entry of goods for exportation.—(1) The exporter of any goods shall make entry thereof by presenting electronically to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form." E

12. Section 2(16) "entry", in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post, the entry referred to in section 82 or the entry made under the regulations made under section 84. F

13. Section 2(5) "bill of export" means a bill of export referred to in section 50.

14. Section 51. Clearance of goods for exportation.—Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation. G

15. Section 2(9) "conveyance" includes a vessel, an aircraft and a vehicle.

Section 2(42) "vehicle" means conveyance of any kind used on land and includes a railway vehicle. H

A (a) of export goods, unless a ... bill of export, ... duly passed by the proper officer, has been handed over to him by the exporter;

(b) ”

B 32. Section 41 of the Act mandates that the person-in-charge of a conveyance carrying export goods shall deliver to the proper officer an EXPORT REPORT in the prescribed form in the case of an export by vehicle.

C “41. Delivery of export manifest or export report.—(1) **The person-in-charge of a conveyance carrying export goods shall, before departure of the conveyance from a customs station, deliver to the proper officer**
 D **in the case of a vessel or aircraft, an export manifest by presenting electronically and in the case of a vehicle, an export report in the prescribed form.”**

E 33. In exercise of the power conferred under Section 157, read with Sections 50 and 60, of the Customs Act, 1962, the Central Board of Excise and Customs made regulations, namely, Shipping Bill and Bill of Export (Form) Regulations, 1991 by a notification No.61/91 (N.T.)-Cus., dated 29.8.1991. Regulation 3 thereof stipulates as follows:

F “Regulation 3. Bill of Export.—**A bill of export to be presented by an exporter of goods be in the form specified in Annexure V, Annexure VI, Annexure VII or Annexure VIII (Se Forms 97, 98, 99 and 100 in Part 5), as the case may be, appended to these regulations.”**

G 34. Regulation 4 prescribes the specifications of the BILL OF EXPORT form.¹⁶

H 16. Regulation 4. Specifications of Shipping Bill and Bill of Export (Form).- The Shipping Bill and Bill of Export forms specified in Annexures 1 to VIII shall be in accordance with the following specifications, namely:-

35. By a notification No.422/76 dated 23.10.1976 which was subsequently amended by another notification, the Central Board of Excise and Customs made regulations known as Export Report (Form) Regulations, 1976. Regulation 3 thereof stipulates that every EXPORT REPORT shall be delivered in duplicate and cover all goods carried in a vehicle.

36. Regulation 4 prescribes the form:-

"Regulation 4. Form of Export Report.—(1) The export report to be delivered under section 41 of the Customs Act, 1962 (52 of 1962) by the person-in-charge of the vehicle carrying export goods shall be in the appended form (See Form 73 in Part 5) to these regulations.

(2) It shall be printed on white paper of size 21.5 cms x 34.5 cms of durable quality."

37. Thus, the movement of goods in the course of export is meticulously regulated and recorded.

38. The appellant, who claims to have exported 4 of the 5 consignments handed over to it by the respondent, could not have loaded the goods at Petrapole Customs station without having obtained a BILL OF EXPORT duly passed by the

(a) the forms shall be printed on foolscap size of paper measuring 34.5 cms by 21.5 cms and shall have the following margins namely:-

(i) top - 1.5 cms, (ii) bottom - 1.5 cms, (iii) left - 1.8 cms, (iv) right - 0.5 cms
The layout of the forms and the size of the boxes shall be as per the layout and boxes shown in the Annexures;

(b) the forms shall be printed on paper of grammage 70 to 85 grams per square metre; the paper should be stable in conditions of 50 to 60 per cent relative humidity;

(c) the captions inside the boxes of the forms should be printed in 6 pt. mono sans-serif and should be located as near as possible to the top left of the boxes;

(d) the forms shall be filled in by using a typewriter only.

A proper officer and the person-in-charge of the conveyance owned by the appellant could not have either loaded the goods in the vehicle or departed from Petrapole Customs station without delivering to the proper officer an EXPORT REPORT in the prescribed form contemplated under Section 41.

B 39. The best proof of the case of the appellant that it had in fact transported the goods in dispute beyond the Petrapole Customs station and out of the customs frontier of India would have been to produce the abovementioned two documents i.e. copies of the BILL OF EXPORT and EXPORT REPORT
 C pertaining to the four consignments in dispute. There is no pleading on behalf of the appellant before the National Commission nor any discussion in the order under appeal regarding the existence of the abovementioned two documents
 D vis-à-vis the four consignments in questions. Except making a bald assertion in the written statement before the National Commission that the appellant had delivered 4 consignments out of the 5 consignments entrusted to it at Benapole (which is already taken note of at para 4 of this judgment.) the appellant did not make any specific pleading regarding the actual dates
 E of the:

1. permission by the proper officer under Section 51 for loading the goods for exportation; or the
2. delivery by the appellant of the EXPORT REPORT under Section 41 with reference to each of the 4 consignments which are allegedly transported and delivered at the Benapole Customs Station Warehouse of Bangladesh.

G 40. We are conscious that the production and proof of the abovementioned documents may not be the only possible evidence to establish that the appellant stood discharged of its legal obligation.

H 41. It is the pleaded case of the appellant that its legal

obligation as transporter ends on its delivering the goods entrusted to it at Benapole Customs station. Unloading of imported goods at any customs station in this country is also regulated by the provisions of the Customs Act, 1962. We are sure that it must be equally regulated by the law of Bangladesh. What exactly the law of Bangladesh is in this regard and how the factum of delivery of goods allegedly carried and delivered by the appellant at Benapole is to be proved are two distinct and different matters. It is a settled principle of private international law that foreign law is always a question of fact which is required to be pleaded and proved by the party whose rights or obligations flow from such foreign law. There is no pleading or proof in this regard in the instant case.

42. The appellant did not plead as to what is the procedure prescribed under the law of Bangladesh for the unloading of the imported goods at its Customs Stations? Nor does the appellant give the details of the dates of the actual delivery of each of the 4 consignments at Bengapole.

43. However, the appellant placed heavy reliance on a letter dated 11.04.2002 allegedly written by some officer of the Customs Department of the Republic of Bangladesh at Beanpole addressed to the Joint Commissioner, Customs Department, Benapole – Jessore (Bangladesh). It refers to four bills of entry dated 9.1.1993, 13.12.1992, 20.12.1992 and 11.02.1993. The relevant portion of the document reads as follows:

“(1) Bill of entry No. – 14305 dated 9.1.1993 of shipping bill No.4949/DB dated 28.12.1992 has been accepted by M/s. Azim Garments Limited Dhaka – Bangladesh. Goods – fabrics 21 bales and name of shipping agent M/S. Mun Mun Shipping – Benapole.

(2) Bill of entry No.2267 dated 13.12.1992 of shipping bill No.3833/DB dated 2.11.1992 has been accepted by M/s. Azim Garments Limited, Dhaka – Bangladesh. Goods

A – fabric 30 bales and name of shipping agent Their Green (Mun Mun) Benapole.

B (3) Bill of entry No.12516 dated 20.12.1992 of shipping bill No. – 3834/DB dated 2.11.1992 has been accepted by M/s. Azim Garments Ltd. Dhaka – Bangladesh. Goods fabrics 30 bales and name of shipping agent M/s. Madeezuddin (A-29).

C (4) The goods of shipping bill No.699/DB dated 11.02.1993 has not been accepted by the party. The goods have been auctioned.”

D 44. It is rather difficult to understand the content of this document, apart from the other problems with the document which shall be discussed later. It speaks about three bills of entry having had been “accepted” through three different shipping agents of M/s. Azim Garments Ltd., Dhaka. Of the 4th bill of entry having not being accepted, the goods were auctioned. It is difficult to understand what exactly is meant by ‘accepting a bill of entry’. At least, insofar as the Indian law is concerned, a bill of entry is a document, under Section 46¹⁷ of

E 17. 46. Entry of goods on importation. - (1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting electronically to the proper officer a bill of entry for home consumption or warehousing in the prescribed form :

F Provided that the Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically , allow an entry to be presented in any other manner:

G Provided further that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

H (2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

the Customs Act, which is required to be presented by the importer. Section 47 stipulates that on receipt of a bill of entry, the proper officer, on being satisfied about the legality of the import and the factum of payment of the appropriate duty on the import of such goods, is required to clear the goods. Assuming that the law of Bangladesh is similar to the law of Customs in India, it is therefore difficult to understand the content of the said letter. It speaks about acceptance of three bills of entry on different dates by three different shipping agents of M/s. Azim Garments Ltd. No explanation in the pleading as to what exactly is the implication of the statement extracted above is available. Assuming for the sake of argument, the letter seeks to convey that the bills of entry for three different consignments had been presented by the shipping agents of M/s. Azim Garments Ltd. and cleared the goods covered by those bills of entry, there is nothing in the letter to indicate that the goods covered by the said bills of entry are the goods which are covered by the four consignment notes which are in issue in this appeal.

45. The document purports to be the internal correspondence between the two officers of the Customs

(3) A bill of entry under sub-section (1) may be presented at any time after the delivery of the import manifest or import report as the case maybe :

Provided that the Commissioner of Customs may in any special circumstances permit a bill of entry to be presented before the delivery of such report :

Provided further that a bill of entry may be presented even before the delivery of such manifest if the vessel or the aircraft by which the goods have been shipped for importation into India is expected to arrive within thirty days from the date of such presentation.

(4) The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

A department of Bangladesh, no doubt purportedly with a copy marked to the appellant herein. There is no pleading explaining the occasion for such a correspondence. The proof of public documents is required to be made in the manner specified under Section 78 of the Evidence Act. Sub-section (6) stipulates the mode of proof of public documents other than those mentioned in sub-section (4) of a foreign country.

“Section 78. Proof of other official documents.—The following public documents may be proved as follows.—

C (1) to (3) x x x

(4) The acts of the Executive or the proceedings of the Legislature of a foreign country,—

D by journals published by their authority, or commonly received in that country as such, or by a copy of certified under the seal of the country or sovereign, or by a recognition thereof in some Central Act;

(5) x x x

E (6) Public documents of any other class in a foreign country,—

F by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.”

G 46. There is nothing on record to establish that the abovementioned letter has been duly proved in accordance with Section 78 of the Evidence Act.

H. 47. For all the above-mentioned reasons, the defence of the appellant based on the letter dated 10.04.2002 (supra) that

the appellant had delivered four consignments entrusted to it by the respondent at the Benapole Customs Station, Bangladesh cannot be accepted. A

48. The other submission of the appellant that in view of the fact that the respondent herein claimed a duty drawback on the strength of the export of the goods which are the subject matter of dispute in this appeal, the respondent cannot dispute the fact that the goods were duly exported, i.e. duly transported beyond India customs frontier and delivered at the Benapole Customs station at Bangladesh. B C

49. The subject of drawback is dealt under Chapter X of the Customs Act 1962. The expression 'drawback' is not defined under the Act. Sections 74 and 75 create a right to claim a 'drawback'. Section 74¹⁸ entitles an exporter to claim D

18. 74. Drawback allowable on re-export of duty-paid goods. - (1) When any goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation, -

(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or E

(ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or

(iii) are entered for export by post under section 82 and the proper officer makes an order permitting clearance of the goods for exportation, ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if - F

(a) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported; and G

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof :

Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit. H

A the repayment/return (drawback) of 98% of any duty paid on material imported into India when again exported out of India subject to the various conditions specified under the Section and the Rules made thereunder.

B 50. Section 75¹⁹ provides for a drawback to be paid to the exporter of any goods who used any imported material of a class or description notified by the Government of India in the

19. 75. Drawback on imported materials used in the manufacture of goods which are exported. -

C (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under section D 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the E rules made under sub-section (2).

Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf :

G Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall except under such circumstances or such conditions as the Central Government may, by rule, specify be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the H amount of such drawback.

manufacture or processing of the goods which are sought to be exported, subject to other conditions stipulated under the said Section and the Rules made thereunder. A

51. Once again in the case on hand, it is not clear from the pleadings of the appellant whether the respondent herein claimed a drawback either under Section 74 or under Section 75. Be that as it may. In either case, the right to a drawback accrues to the exporter once the exporter makes an entry for export of the goods under Section 50 of the Act and on the making of an order by the proper officer under Section 51 permitting clearance and loading of the goods. The scope of both of these sections has already been examined earlier in this judgment. B C

52. Rules are made by the Government of India from time to time in this regard. The Rules currently in vogue are known as the "Customs, Central Excise, Duty and Service Tax Drawback Rules, 1995", which are made in exercise of the rule making authority conferred under the various enactments including the Customs Act. However, these rules are subsequent to the export transaction in question. Neither the relevant rules governing the situation on the date when the respondent claimed the drawback are placed before us nor is there any clear pleading by either party as to the relevant date on which such a claim for drawback could be made. We are not sure whether under the rules applicable to the transaction in question, whether it is the date of the actual delivery of the goods in the foreign country which entitles the exporter to file an application claiming drawback or is it the date of the entry of the goods for export from India. In the absence of any material on record such as the one indicated above, the mere fact that the respondent did claim (the respondent admitted that they did claim a duty drawback as alleged by the appellant) a duty drawback does not necessarily lead to the inference that the appellant had duly delivered the goods in question at Benapole Customs station. D E F G

H

A 53. Under the 1995 Drawback Rules, which are in force today, Rule 13 stipulates that the claim for a drawback can be filed on the date when the proper officer makes an order permitting clearance and loading of the goods under Section 51 of the Act. We refer to Rule 13 not because it is applicable
B to the facts of the case, but only to demonstrate that the law clearly provides for the date and event, the happening of which, entitles the exporter for seeking the drawback.

C 54. In view of the fact that the appellant admitted the entrustment of goods by the respondent to the appellant for transportation to Benapole (Bangladesh), the burden to prove that the appellant satisfactorily discharged his legal obligation to deliver the goods at Benapole (Bangladesh) in accordance with law is on the appellant which burden the appellant failed to discharge. In our opinion, therefore, the National Commission
D rightly allowed the claim of the respondent. We do not see any reason to interfere with the same. Appeal is dismissed. No order as to costs.

Kalpana K. Tripathy

Appeal dismissed.