

**FONNYS PVT LTD.**  
**v**  
**SRI LANKA PORTS AUTHORITY**

COURT OF APPEAL  
SALEEM MARSOOF, J. (P/CA)  
SRIPAVAN, J.  
C.A. NO. 714/98  
JUNE 28, 2004 AND  
JULY 21, AND 22, 2004

*Sri Lanka Ports Authority Act, No. 51 of 1979, sections 6(1), 7, 37, 38, 63, and 75 – Importation of tyres – Customs duty paid – Consignment not cleared not due to importer's fault – Decision to waive demurrage by Minister – Is it lawful – What is demurrage? – Right of Ports Authority to levy charges' Basic rent and penal rent.*

The petitioner imported industrial off road tyres. The Customs approved the documents and the petitioner paid the customs duty on the consignment, but the consignment was cleared after 63 days. The demurrage charges were waived on the recommendation of the customs by the Minister. However, the Ports Authority requested the petitioner to pay the basic rent and all other port charges – that included demurrage charges.

The petitioner sought to quash that order:

**Held:**

- i) Demurrage is a kind of compensation or charge that is levied by a ship owner or carrier from the charterer as a matter of contract for exceeding lay time.
- ii) The Ports Authority has a legal and statutory power to levy charges that may be agreed to by the parties by contract and the liability to pay these charges do not depend on whether the consignee was at fault. The question is not whether the consignee has been at fault for the delay but whether the consignee occupied the warehouse or storage space of the Authority for more than the period of grace.
- iii) Demurrage rent includes penal charges as well as basic rent.
- iv) The Ports Authority having rendered services is entitled to levy the charges in terms of the Port Authority Act and it has a *lien* on the goods until such charges are paid.

**QUARE** — Is the order made by the 2nd respondent, Finance Manager, Ports Authority amenable to prerogative remedies?

**Cases referred to:**

1. *The Johanna Oldendorff* – (1973) 2 *Lloyds Re.* 285 at 304.
2. *Krishna Mining Co. Ltd., v Pan Islamic Steamship Co, Ltd.*, (2002) 2 SRI LR 39 at 42.
3. *Sri Lanka Ports Authority v Peiris* – (1981) 1 SRI LR 101
4. *Tajit & Co. (Pvt) Ltd., v Sri Lanka Ports Authority and two others* – CA 678/99 CAM 20.7.00.
5. *Tajit & Co. (Pvt) Ltd., v Sri Lanka Ports Authority and two others* – SC 12/2001 – SCM 18.7.2002

A.L.M. Hedayathulla with C. Colonne for petitioner  
Arjuna Obeysekera, State Counsel for respondents.

*Cur.adv.vult*

September 17, 2004

**SALEEM MARSOOF, J. CA**

The petitioner imported from Israel a consignment of industrial off-road tyres valued at US\$ 25,238 which is equivalent to Rs, 1,621,412.41 at the rate of exchange prevailing at the time of the filing of this application. The said consignment arrived at the Port of Colombo in the steamer "Gibraltar Bridge" on or about 21st March 01

1998. After having the shipping documents processed and approved by the Sri Lanka Customs, the petitioner paid a sum of Rs. 949,333/- as customs duty for the said consignment on 31st March 1998, as evidenced by the receipt issued by the Sri Lanka Customs marked 'D'. However, the petitioner states that its representatives were informed by the Valuation Department of the Sri Lanka Customs that the consignment cannot be cleared since the documents have been referred to the Preventive Division of the Sri Lanka Customs for their approval. 10

It appears that certain investigations were conducted by the Preventive Division of the Sri Lanka Customs as to whether the consignment in question has been under-valued. The petitioner complains that the Preventive Division of the Sri Lanka Customs took 63 days to satisfy itself that there was no under-valuation of the goods, and the petitioner was allowed to clear the said consignment only on 2nd June 1998. It is common ground that the petitioner made representations to the Director-General of Customs that the petitioner should not be burdened with payment of port demurrage charges for the said period. The Director-General of Customs had in his letter dated 29th May 1998 addressed to the Chairman of the 1st respondent marked 'G' admitted that the release of the consignment to the petitioner was delayed pending the investigation by the Preventive Division of his Department. In the same letter, the Director-General of Customs has recommended to the Chairman of the 1st respondent that the port demurrage charges incurred during this period should be waived, "taking into consideration that the importer was not penalized for the subject container." 20 30

The Director (Commercial Services) of the 1st respondent has by his letter dated 6th July 1998 marked 'H' informed the petitioner, with copies to the other relevant authorities including the 2nd respondent, that the Minister of Port Development, Reconstruction and Rehabilitation has allowed the waiver of demurrage rent on the above consignment up to the date of clearance. However, when the petitioner's representative went to clear the goods, the 2nd respondent, who is the Finance Manager of the 1st respondent, has made an endorsement on the letter dated 6th July 1998 produced marked 'I' to the following effect- 44

“Waive penal rent  
Recover basic rent and  
All other port charges”

The petitioner, in these proceedings initiated on 21st July 1998, seeks prerogative relief by way of-

- (a) a writ of *certiorari* quashing the order and / or decision made by the 2nd respondent as evidenced by the endorsement made by him on the letter dated 6th July 1998 marked as ‘I’; 50
- (b) a writ of *mandamus* ordering the 1st and 2nd respondents to release the consignment referred to in the said letter marked as ‘I’ on payment of the relevant port handling charges.

It is relevant to note that despite the admission made by the Director-General of Customs in his letter dated 29th May 1998 marked ‘G’ that the non-delivery of the said consignment up to June, 1998 was not due to any fault of the petitioner but solely due to the actions of the Customs, the petitioner did not cite the Director-General of Customs or the Attorney-General as a respondent to this application. He made an application in January, 2003 to add the Director-General of Customs as a party to these proceedings, which application was refused by this court by its order dated 27th January 2003 on the ground of it belatedness and the fact that no relief had been claimed against the Director-General of Customs in the petition filed in this case. 60

The gist of the petitioner’s case is that the 2nd respondent Finance Manager has no legal right to make the said order or decision by way of the said minute to pay what is referred to as the basic rent and / or the said order is in excess of his authority and / or contrary to the Minister’s ruling to waive the demurrage rent. The position of the petitioner is that the decision of the Minister to waive the ‘demurrage rent’ communicated to the petitioner by the Director (Commercial Services) of the 1st respondent through his letter dated 6th July 1998 marked ‘H’ covered not only penal rent 70

but also basic rent. It has been stressed that the Director-General of Customs has in his letter dated 29th May 1998 marked 'G' conceded that the petitioner was not at fault, and the delay was solely due to the Preventive Division of the Sri Lanka Customs taking nearly 60 days to process the documents and complete investigations, which has also been accepted by the relevant Minister in his letter marked 'H'. It is submitted on behalf of the petitioner that the Sri Lanka Ports Authority Act, No. 51 of 1979, as subsequently amended, only sanctions the levy of 'charges', there being no reference in the Act to 'basic rent' or 'penal rent'. The petitioner claims that it is entitled to take delivery of the said consignment on payment of port charges only.

The position of the respondents is that according to the Sri Lanka Port Authority Tariff Guide marked '2R2', two different types of rentals, namely basic rent and penal rent are charged from any consignee who utilizes storage space of the Port Authority, depending on the number of days within which they clear their cargo. The respondents contend that the recommendation of the Director-General of Customs contained in his letter dated 29th May 1998 marked 'G' was to waive port demurrage charges only, and in fact the 1st respondent, acting on the request of the petitioner, sought the approval of the Minister of Port Development, Reconstruction and Rehabilitation to grant a waiver of demurrage charges by its letter dated 23rd June 1998 marked '2R1' addressed to the Secretary to the said Ministry. The decision of the Minister to waive the 'demurrage rent' was conveyed to the petitioner by the Director (Commercial Services) of the 1st respondent through his letter dated 6th July 1998 marked 'H'. The 'demurrage rent' referred to in the said letter marked as H is in respect of 'penal charges' as appearing in the SLPA Tariff Guide marked as '2R2'. Accordingly, it is contended by the respondents that as only 'penal rent' or what is commonly referred to as the 'demurrage rent' have been waived, the petitioner is liable to pay the basic rent and port handling charges to the SLPA, which has been calculated at Rs. 147,000 as evidenced by the documents marked '2R4a' to '2R4c'.

It is important to note that the petitioner does not seek to challenge or question any recommendation or decision contained in the letters dated 29th May 1998 marked 'G', 23rd June 1998 marked '2R1' or 6th July 1998 marked 'H'. These letters contemplated a waiver respectively of 'port demurrage charges', 'demurrage charges' and 'demurrage rent'. The petitioner only seeks relief against the order and / or decision made by the 2nd respondent as evidenced by the endorsement made by him on the letter dated 6th 120 July 1998 (H) which endorsement is marked as 'I' which required the petitioner to pay 'basic rent' and 'all other port charges'. The 2nd respondent has gone on the basis that what has been waived is 'penal rent'. One of the main questions for decision in this case therefore is whether 'basic rent' and 'port demurrage charges', which the petitioner has been directed to pay by the 2nd respondent, are caught up within the meaning of 'demurrage rent' which has been waived as evidenced by the letter 'H'. In other words, was the 2nd respondent right in equating what has been variously described as port demurrage charges, demurrage charges and 130 demurrage rent with his own notion of 'penal rent', a phrase which has not been used in any of the letters marked 'G', '2R1' and 'H'?

Before considering the applicable statutory provisions and decisions of our courts interpreting these provisions, it will be useful to examine the general meaning of some of the phrases used in the letters marked 'G', '2R1' and 'H'. As all these letters use the word 'demurrage' in some form or other, the meaning of that term may be elicited from relevant texts and case law. In *The Johanna Oldendorff* <sup>(1)</sup> Lord Diplock divided the adventure contemplated by a voyage charter into four successive stages, where the two voy- 140 age stages (i.e. the voyage prior to loading of the cargo and the voyage after the loading of the cargo but prior to the discharge of the cargo) identified by him were in the hands of the ship owner whilst the loading and discharging stages are joint operations between the ship owner and the charterer. The ship owner in consideration for the charter hire received by him, allows the charterer a certain number of days within which the charterer must complete the loading or discharging operations, as the case may be. This period allowed by the ship-owner is commonly referred to as 'lay time'. The moment the loading or discharging operation stretches 150

beyond lay time, it triggers off liability for demurrage. In '*Laytime and Demurrage*' by John Schofield (1986 Edition — Lloyds Press) at page 5, the concept of demurrage is explained as follows:-

"If loading or discharging are not completed within the time allowed, then the ship-owner is entitled to be compensated for the extra time taken. This may either take the form of liquidated damages, *demurrage* or unliquidated damages, where the claim is one for detention. Demurrage is usually specified in the charter as a daily rate and the parties may either agree for a limited period on demurrage or more commonly, for an unlimited period. It is now generally accepted that failure by the charterer to complete loading (or discharging) within the time allowed *is a breach of contract.*" (italics added)

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The *Oxford Dictionary* (10th Edition) page 381 defines 'demurrage' as "a charge payable to the owners of a chartered ship in respect of delay in loading and discharging". In *Krishna Mining Co. Ltd. v Pan Islamic Steamship Co. Ltd* (2) Nimal Dissanayake J., defined the term as "damages payable by the charterer for the delay caused over and above the agreed time for discharging or loading." Learned Counsel for the petitioner has invited our attention to the following definition of the term found in 'The Shipping Terms' of P&O Nedloyd-

"Demurrage

1. A variable fee charged to carriers and / customers for the use of Unit Load Devices (ULD's) owned by a carrier beyond the free time of shipment.
2. Additional charges imposed for exceeding the free time, which is included in the rate and allowed for the use of certain equipment at the terminal"

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From the foregoing it would be apparent that 'demurrage' is a kind of compensation or charge that is levied by a ship-owner or carrier from the charterer as a matter of contract for exceeding lay time. The question that arises in the context of this case is whether 'demurrage', whether in the form of 'port demurrage charges', 'demurrage charges', 'demurrage rent' or 'occupational charges' can be levied by a port authority such as the 1st respondent.

The issue whether 'demurrage charges' in the form of port charges or rent can be recovered by the Sri Lanka Ports Authority was considered by the Supreme Court in *Sri Lanka Ports Authority v Peiris* (3). In this case, the Sri Lanka Ports Authority (SLPA) sued the defendant to recover a sum claimed by it as 'prescribed charges' recoverable on account of demurrage. Judgment was given for the plaintiff as prayed for in the District Court. But this judgment was set aside in appeal and the plaintiff's action dismissed and a counter claim by the defendant allowed. The Court of Appeal held that the plaintiff's claim to recover demurrage as 'prescribed charges' was untenable in law, upholding a contention of the defendant that the said sum could not be recovered as it was not a 'port service' referred to in section 4(1)(a) of the Port (Cargo) Corporation Act, nor a 'prescribed service' referred to in section 63 (1) of the Act. It was held that it was therefore beyond the powers of the Minister to fix rates for demurrage by order under section 63(1) as it was not a 'service', and accordingly the claim made by the plaintiff for demurrage on the basis of the charges so fixed by the Minister could not be maintained.

On appeal, the Supreme Court held that the 'prescribed services' referred to in section 63 (1) are the 'port services' prescribed in section 4(1) of the Port (Cargo) Corporation Act, No.13 of 1958, as subsequently amended. These 'services' involve, *inter alia*, the provision of cargo barges or lighters by the Corporation for the landing and discharging of cargo. It was not disputed that the Corporation is entitled to charge hire for the use of its lighters in connection with the performance of its 'port services' and such hire can be determined not only with reference to the weight of the cargo but also with reference to the time that the plaintiff's lighters are engaged and detained in such 'service'. A 'service' of stevedoring and landing is not complete until the lighter containing the cargo is cleared by the consignee, and any default on his part in expeditiously clearing the cargo will result in the detention of the plaintiff's lighter. In this factual background, Sharvananda, J. made the following pertinent observation at page 106 of the judgment.

"It is only when the cargo has been cleared by the consignee can it be said that the plaintiff has performed its stevedoring/landing services and is discharged from its obligations. Hence it is legitimate and competent for the



Corporation to charge the consignee for undue detention as incidental to the charges for the hire of its lighters. When the Minister provided for 'demurrage' in the Gazette Notification P1, he imposed such charge as a charge for the prescribed 230 port services provided by the plaintiff, calculated by the time involved in performing those services and he was entitled to do so.....In my view the Court of Appeal was in error in holding that the Minister had acted *ultra vires* in fixing rates for demurrage. The provision respecting 'demurrage' in P1 represents a reasonable pre-estimate of the damages that will result from the detention of the plaintiff's lighters beyond the stipulated time."

It is relevant to note that the above decision was based on the provisions of the Port (Cargo) Corporation Act, No. 13 of 1958, 240 which has since been repealed and replaced by the Sri Lanka Ports Authority Act, No. 51 of 1979, which is currently in force. Before examining in depth the provisions of this Act relating to the matter in issue in this case, it is necessary to refer to another decision of courts which considered the interrelation between demurrage charged by the ship-owner and demurrage charged by a port authority.

*Krishna Mining Co. Ltd. v Pan Islamic Steamship Co. Ltd* (*supra*), the plaintiff-respondent shipping company sued the defendant-appellant for the recovery of a certain sum as demurrage, due 250 to them on account of the ship chartered by the defendant-appellant, being delayed at Chittagong. The defendant-appellant denied liability to pay any demurrage and claimed in reconvention a certain sum being the value of 2000 MT of edible salt made unfit for human consumption as a result of being contaminated with goods unlawfully stored on the hatches of the ship. The District Court entered judgment for the plaintiff as prayed for and dismissed the claim in reconvention. On appeal it was contended that demurrage is charged by the Ports Authority, and that the plaintiff-respondent had failed to prove that it was charged demurrage by the Chittagong 260 Ports Authority and that the said demurrage was paid by the plaintiff-respondent. The Court of Appeal pointed out that on a Charterparty agreement both carrier and the charterer agree in fixing a time for the purpose of loading and discharging the cargo,

what is called the 'lay time'. When the cargo is booked on F.I.C.S. basis under the Charterparty, loading and unloading of cargo is done by the charterer's stevedores. If the lay time, is exceeded by the charterers, then the vessel is said to go on demurrage. The court rejected the argument presented by the defendant-appellant that as charterer, it can only be liable to pay demurrage to the ship- 270 owner if the latter had paid demurrage to the relevant port authority. At page 42 of the judgment, -Dissanayaka, J. observed as follows-

"Demurrage, is damages payable by the charterer for the delay caused over and above the agreed time for discharging or loading. It is to be observed that in the aforesaid Charterparty (P1) Gencon Rule 6 and the Rider Clause 3 entered into by the parties has laid down a specific lay time for the said cargo.

The demurrage agreed on a charter party is payable to the 280 carrier in respect of the ship as against demurrage paid to the port. Eventually, the carrier is liable to pay the port demurrage for the delay in moving the ship out of the port. The liability of the charterer to pay demurrage to the carrier for delay that is caused on his behalf in unloading the cargo from the ship on the Charterparty, is not dependant on the carrier's liability to pay demurrage to the port. It arises independently on the Charterparty.

In this case the defendant-appellant has agreed by Clause 18 of the Charterparty and Rider Clause 5, to pay demurrage to 290 the plaintiff-respondent at US\$ 3,000 per day. According to the aforesaid Clause 18 of the Charterparty and Rider Clause 5, the plaintiff-respondent is not obliged to produce documents to show that they have paid the port demurrage, when they demand demurrage which the charterer was liable to pay under the Charterparty agreement."

It is clear from the above *dicta* of Dissanayake, J. as well as from the decision of the Supreme Court in *Sri Lanka Ports Authority v Peiris* discussed earlier that the concept of 'demurrage' is not only applicable to the contract of Charterparty but is also relevant in con- 300 nection with loss suffered by port authorities such as the 1st

respondent as a result of delays in loading or unloading beyond what is known as 'lay time'.

It is now convenient to examine in some depth the provisions of the Sri Lanka Ports Authority Act, No. 51 of 1979, as subsequently amended, insofar as they relate to the issues arising in this case. According to section 6(1) of this Act it is a statutory duty of the Sri Lanka Port Authority to "provide in any specified port, efficient and regular services for stevedoring, lighterage, shipping and transhipping, landing and warehousing of dry and wet cargo and cargo in bulk; for wharfage, the supply of water, fuel and electricity to vessels, for handling petroleum, petroleum products and lubricating oils in and from vessels and between bunkers and depots; for pilotage and the mooring of vessels". According to section 7(1)(z)(iii) of the Act, the Authority is empowered to provide or cause to be provided services involving "the sorting, weighing, measuring, storing, warehousing or otherwise handling of any goods". The Port Authority renders port services comprising *inter alia* of port handling services and warehousing services, and it is empowered by section 75 of the Sri Lanka Port Authority Act to enter into such contracts as may be necessary for these purposes. Section 37 of the Sri Lanka Ports Authority Act provides that—

- (1) The charges that may be levied by the Ports Authority for the services provided by the Authority shall be fixed, and may be revised from time to time, by the Authority, with the approval of the Minister who shall, before giving his approval, consult the Minister in charge of the subject of Finance.
- (2) Until the charges are fixed under subsection (1) the charges leviable for services by the Principal Collector of Customs, the Port Commissioner, the Master Attendant of any specified port, the Port (Cargo) Corporation and the Port Tally and Protective Services Corporation on the day immediately preceding the appointed date shall be the charges for the respective services rendered by the Ports Authority."

Section 38 of the Act, provides for several ways in which the

charges can be recovered. It is of interest to note that section 38(a) provides that—

“The Ports Authority shall, in respect of charges which have <sup>340</sup> not been paid on any goods, have a lien on such goods and shall be entitled to seize and detain such goods until the charges are fully paid, provided that the Principal Collector of Customs has no claim on such goods as goods seized or forfeited or goods liable to such seizure or forfeiture under the Customs Ordinance.”

The term ‘charges’ that appear in sections 37 and 38 has been defined in section 89 of the Act in the following lines:-

“ ‘Charges’ includes charges, rates, fees and dues of every description which the Ports Authority is for the time being <sup>350</sup> authorised to demand, take and recover and ‘charge’ shall be construed accordingly”.

The charges that the Sri Lanka Port Authority could levy have been set out in the SLPA Tariff Guide marked ‘2R2’. These charges include ‘basic’ and ‘penal’ charges which have been approved by the relevant Minister. As the 2nd respondent Authority enters into contracts with the parties who wish to make use of the services provided by the Authority, the charges specified in the said Tariff Guide will be recoverable in terms of these contracts. As has already been noted, section 38 of the Sri Lanka Ports Authority Act <sup>360</sup> also creates a statutory lien over the goods to facilitate the recovery of charges without recourse to courts.

The right of the Sri Lanka Port Authority to levy charges where goods have been detained by the Sri Lanka Customs has been considered by this court in *Tajit & Co (Pvt) Ltd v Sri Lanka Port Authority and Two others* <sup>(4)</sup>. In this case the petitioner wanted to re-ship the cargo imported by it that had been detained by the Sri Lanka Customs. The petitioner took up the position that there was a delay on the part of the Director-General of Customs to take a decision in regard to the re-shipment. In view of this delay, the <sup>370</sup> Director-General of Customs had recommended a waiver of part of the demurrage but notwithstanding such recommendation, the Port Authority had called upon the petitioner to pay demurrage, rent and other port charges. The petitioner instituted proceedings in the

Court of Appeal, challenging the decision of the Port Authority. J.A.N. de Silva, J. observed that—

“It is true that according to P3 the Director-General of Customs has suggested to the Ports Authority that the petitioner should be given some relief in respect of the consignment *as there was no customs violation committed*. It is <sup>380</sup> observed that the concession suggested by the Director-General of Customs should be considered in the light of the provisions of section 38 (1) of the Sri Lanka Ports Authority Act which deals with ‘Recovery of charges in arrears.’ ”

After analysing the provisions of section 38 of the Act, His Lordship concluded as follows:

“From the above, it is clear that the 1st respondent has the statutory authority to levy port charges, irrespective of whether the goods were seized by the Customs or not. In the circumstances, the rejection by the Ports Authority of <sup>390</sup> the request made by the Director-General of Customs to waive part of the port charges cannot be considered as illegal or arbitrary.”

The case went on appeal to the Supreme Court which affirmed the decision of the Court of Appeal. In *Tajit & Co (Pvt.) Ltd v Sri Lanka Port Authority and Two others*<sup>(5)</sup>. His Lordship S.N. Silva, C.J. observed as follows in the course of his judgment:-

“The only issue in this appeal relates to the amounts payable by the petitioner to the 1st respondent in respect of the charges for the space occupied by the containers during the period they were lying in the premises of the 1st respondent. The document P7 which is sought to be quashed is a summary of the bills that have been issued to the petitioner. It is a claim for services rendered by the 1st respondent in holding the goods during the relevant period. *This document does not in any way attract administrative remedies*. <sup>400</sup>”

The 1st respondent having rendered services, is entitled to levy the charges in terms of the Sri Lanka Ports Authority

Act, No. 51 of 1979 and it has a lien in terms of section 38 410  
(1)(a) on the goods until such charges are paid. It is clear  
from the document P7 that the 1st respondent has granted  
a waiver to the petitioner in respect of the period 10.4.1999  
to 17.5.1999 although the goods were lying in the premis-  
es even during that period.

Learned President's Counsel for the 1st respondent sub-  
mitted that such a waiver was granted on the basis that the  
goods were detained on the orders of Department of  
Customs. However, we note that a *waiver could not have  
been granted unless the goods were seized by the* 420  
*Customs*. It is a common ground that there was no seizure  
of the goods by the Customs and the goods remained the  
property of the petitioner throughout the period they were  
lying in the premises of the 1st respondent. *Therefore, the  
waiver that has been granted is without any basis in law.  
The petitioner has got a benefit by P7 which he is not enti-  
tled to in law.* In the circumstances, the petitioner has no  
cause for complaint with regard to P7." (Italic added)

Learned State Counsel appearing for the respondents has  
relied heavily on the decision of this court in the above case, 430  
which has been affirmed by the Supreme Court. At the hearing  
of this application, learned Counsel for the petitioner sought to  
distinguish this decision on the basis that the consignment of the  
petitioner had been detained for no fault of the petitioner where-  
as in the decided case, there had been a delay in clearing the  
goods. It is necessary to observe that the decision of the  
Supreme Court took cognizance of the fact that the Sri Lanka  
Port Authority has a legal and statutory power to levy charges  
that may be agreed to by the parties by contract, and the liabil-  
ity to pay these charges do not depend on whether the con- 440  
signee was at fault. The petitioner in this case is complaining  
that the Sri Lanka Customs delayed the investigation regarding  
valuation of the goods which was the identical position taken by  
the petitioner in the *Tajit* case. This position has been rejected,  
both by the Court of Appeal and the Supreme Court. As rightly  
contended by learned State Counsel, the question is not  
whether the consignee has been at fault for the delay but

whether the consignee occupied the warehouse or storage space of the 2nd respondent authority for more than the period of grace.

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Learned Counsel for the petitioner concedes the right of the 1st respondent authority to recover the rent and charges in question, and in fact states that his client is ever willing to pay the port charges and take possession of the goods. However, he contends that the decision of the Minister to waive the 'demurrage rent' communicated to the petitioner by the Director (Commercial Services) of the 1st respondent through his letter dated 6th July 1998 marked 'H' covered not only penal rent but also basic rent. It is the contention of the respondent that the phrase 'demurrage rent' appearing in the aforesaid letter is a 460 reference to 'penal charges' that can be levied by the 1st respondent Sri Lanka Ports Authority in terms of section 37 of the Act, but it does not cover or include basic rent. The SLPA Tariff Guide marked '2R2' makes reference to various types of charges, and deals with 'Occupation Charges' in paragraph 48.00 thereof in the following manner:

48.0 Occupation Charges

48.01 Imports if cleared within 3 clear days/ ]  
 exports if shipped within 7 clear days ] FREE

48.02 Basic Charge (If not cleared/shipped ] CHARGES 470  
 within the specified period) (from ] ARE LEVIED  
1st day upto the date cleared/shipped ] AS PER CATE-  
 ] GORY OF  
 ] CONTAINER

Penal Charge

48.03.01 8th day to 14th day ] CHARGES ARE  
 48.03.02 15th day to 21st day ] LEVIED AS PER  
 48.03.03 Thereafter ] CATEGORY OF  
 ] CONTAINER

Learned Counsel for the petitioner has pointed out that 480 nowhere in the SLPA Guide marked '2R2' has 'demurrage rent' been defined or categorized as 'penal rent'. He stresses that in terms of paragraph 48.03 of this Guide the penal charge is also imposed on the basis of the number of days the importer failed

to clear the goods. He therefore submits that in essence the so called 'penal charge' is a form of demurrage as would appear from the authorities referred to above. Learned State Counsel has emphasized that in terms of the SLPA Guide, any goods imported to Sri Lanka can be cleared free from the payment of any occupation charges if they are cleared within 3 days of the goods being stored on Port Authority premises. Learned State Counsel further submits that according to the said Guide, if the goods so imported to Sri Lanka are not cleared within the stipulated period of 3 days, the 'owner' of goods (including a 'consignee') becomes liable to pay the basic charge from the first day up to the date the said goods are cleared from the Port Authority premises as provided in Clause 48.02 of '2R2'. It is submitted by learned State Counsel that there is an additional rent or charge that is payable by a delinquent importer whose goods occupy the port facilities beyond a period of 7 days, which is known as the penal charge. This charge has been split into 3 tiers, as set out in clauses 48.03.01 to 48.03.03 of the Guide, and accordingly if the goods are not cleared within 21 days, a higher penal rate is charged from the owner of goods. It is the contention of the learned State Counsel that the SLPA Tariff Guide draws a distinction between basic charges (commonly referred to as basic rent) and penal charges, which are imposed with a view of deterring undue delay in clearing the goods, and have been structured in such a way that the longer the delay the higher the rate one has to pay.

It is important to note that this question of interpretation arises in the context of a letter written by an officer of the Government for the purpose of communicating a decision of a Minister in regard to a matter for which there is no express statutory provision. In fact, learned State Counsel has stressed that there is no express provision in the Sri Lanka Port Authority Act, No. 51 of 1979 for waiving any of the charges that may otherwise be levied by the said Authority, and that the Authority could have in law ignored the decision of the Minister to waive 'demurrage rent' communicated to the petitioner by the letter dated 6th July 1998 marked 'H'. While the 1st respondent has not chosen to ignore the said letter, he has taken action to give effect to it, and the parties are in fact in dispute in regard only



the scope of the waiver purportedly made by the Minister as embodied in the said letter. The issue is simply, whether the phrase 'demurrage rent' as used in the said letter included 'penal rent' only or whether it extended to 'basic rent' or 'basic charge' as well. The 2nd respondent has sought to give a particular interpretation to those words, and this court is not in a position to find that the interpretation placed by him as reflected 530 in the order marked 'I' is unreasonable or irrational. Even if this court was of the opinion (which is clearly not the case) that the interpretation placed by the 2nd respondent is not well founded, this court will not intervene as it is definitely not a determination of an authority made in the exercise or purported exercise of any statutory power which is amenable to the supervisory jurisdiction of this court under Article 140 of the Constitution.

It is necessary to add that learned State Counsel appearing for the respondents has pointed out that the payment of basic rent and port charges are liabilities which arises from the con- 540 tract between the petitioner and the 1st respondent authority, and that prerogative relief would in any event not be available in such a contractual context. It is manifest from the authorities referred to earlier in this judgment that 'demurrage' itself is a matter of contract between the charterer and the owner of a ship or the 'owner' of goods (including a consignee) and a port authority. Although in the circumstances it is apparent that the order marked 'I' made by the 2nd respondent would not be amenable to prerogative remedies such as *certiorari* and *mandamus*, it is not necessary to decide this question in view of the 550 position that the learned Counsel for the petitioner was not able to refer this court to any statutory provisions under which a waiver of 'occupational charges' such as basic charge or basic rent could be made.

For the foregoing reasons this court has to dismiss the application of the petitioner for the twin writs of *certiorari* and *mandamus* with cost fixed at Rs. 12,000/- payable by the petitioner.

**SRIPAVAN, J.** - I agree.  
*Application dismissed.*