1969 *Present :* **H. N. G. Fernando, C.J., and Wijayatilake, J.**

PORT CARGO CORPORATION, Appellant, *and* K. M. MOHIDEEN, Respondent

S. C. 574/66 (F)—D. C. Colombo, 63324/M

Port Cargo Corporation—Goods discharged by it from a ship and thereafter deposited in a Government warehouse—Loss of the goods from the warehouse—Whether the Corporation is liable for such loss to the consignee—Burden of proof—Extent of Corporation's liability as a carrier—Port (Cargo) Corporation Act, No. 13 of 1958, ss. 4 (1), 5 (1) (g), 79—Customs Ordinance, ss. 47, 69, 108.

Certain goods consigned to the plaintiff were pilfered while they were in a Government warehouse after they had been landed on shore by the Port Cargo Corporation according to custom and deposited in good condition in the warehouse. The plaintiff claimed that the Corporation was liable for the loss of the goods from the warehouse. He based his claim on the ground that there was prima facie proof that the goods were stolen as a result of a wrongful or unlawful act on the part of the Corporation or its servants. Alternatively, it was argued on behalf of the plaintiff that there was ample evidence upon which to find that there was an implied contract upon which the Corporation assumed the obligations of a common carrier or carrier by trade, and that one of these obligations was to store the goods in the warehouse and to be responsible for their care and custody while in the warehouse.

The evidence showed that the Corporation's officers and servants were on duty in the warehouse at all times throughout the day and that the Customs authorities were in exclusive control of the warehouse during the night. The Corporation recovered charges from consignees for handling goods from the time of commencement of discharge from ships and until the time of their removal from the Port premises, but there was always on duty at least one Customs officer, who had effective custody and control of the goods lying in the warehouse, and no goods could be removed from the warehouse except under his authority after some other Customs officer had passed a Bill of Entry upon payment of duty. The plaintiff did not prove any "special agreement" by which the Corporation undertook liability for care and custody of the goods even during the day.

Held, (i) that, if the only basis of the liability of the Corporation was to be found in section 79 of the Port (Cargo) Corporation Act, the burden lay on the plaintiff in the first instance to prove some negligent or unlawful act of the Corporation or its servants.

(ii) that section 79 of the Port (Cargo) Corporation Act prevented the Corporation from assuming by contract, whether express or implied, a liability more wide in respect of goods lodged in the Customs warehouse than the liability referred to in that section.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *Mark Fernando* and *E. B. Paul Perera*, for the Defendant-Appellant.

C. Ranganathan, Q.C., with *K. N. Choksy* and *Miss N. Naganathan*, for the Plaintiff-Respondent.

Cur. adv. vult.

January 23, 1969. H. N. G. FERNANDO, C.J.—

The Port Cargo Corporation established under Act No. 13 of 1958, now provides all "port services" in the Port of Colombo, that is to say "services for stevedoring, landing and warehousing of cargo, wharfage ..... and any other services incidental thereto". According to the findings of fact reached in this case by the District Judge—

(1) 2 cases of sewing machine needles consigned to the plaintiff arrived at the Port of Colombo on the SS "Mannar", and according to the prevailing custom, the defendant, the Port Cargo Corporation, through its agents and servants took charge of the cases, landed them on shore and deposited them in a Queen's warehouse on 11th December, 1962;

(2) the 2 cases remained in the Queen's warehouse until 13th December on which date a bill of entry was signed by an appropriate officer of Customs in terms of s. 47 of the Customs Ordinance as authority for the delivery of the cases to the consignee;

(3) in accordance with custom, the cases were removed from the warehouse on 13th December by the defendant's officers and servants for the purpose of delivery to the plaintiff by loading them in a lorry, but it was found at this stage that ammonia was pouring out of the cases;

(4) on examination by a ship's surveyor, the cases were found to contain sulphate of ammonia and broken pieces of wood and gunny sacks; some of the metal bands of the cases were found to be broken;

(5) upon the evidence, it was held that the cases, which had contained sewing needles at the time of their deposit in the warehouse, had been tampered with and their contents pilfered while they were in the warehouse.

Paragraph 10 of the plaint in this action averred that the non-delivery of the two cases of needles was due to the negligence and/or default and/or wrongful and/or unlawful acts or omissions of the defendant or of its officers, agents or servants, consisting *inter alia* of—

(*a*) the failure to exercise due care and diligence in looking after and/or safeguarding the said two cases and the contents thereof;

(*b*) the failure to take necessary steps to guard against theft or pilferage of the said two cases and/or their contents;

(*c*) failure and/or negligence in not securing the said two cases in special grilles within the warehouse.

It is clear that in this paragraph the plaintiff sought to exclude his case from the operation of section 79 of Act No. 13 of 1958, which provides that the Corporation shall not be liable for any loss or damage to goods deposited in a Government warehouse, unless such loss or damage had been caused by the negligence or by the wrongful or unlawful acts of the Corporation or any of its officers, servants, etc. The learned District Judge has held that the plaintiff paid warehouse rent in this case on the footing that the warehouse in question is a warehouse approved under s. 69 of the Customs Ordinance and that this is sufficient evidence of the fact that the two cases of needles were deposited in a warehouse referred to in s. 79. During the argument in appeal, Counsel appearing for the plaintiff did not contest the correctness of this finding. There was in fact other evidence concerning the practice in the Port which was quite sufficient to establish that these cases were in fact deposited in a Queen's warehouse.

Upon the issues framed upon the cause of action pleaded in paragraph 10 of the plaint, the learned District Judge has held that there was no positive evidence of negligence, but that a presumption of negligence arose because the Corporation took charge of a consignment in good condition, whereas when the plaintiff went to obtain delivery, the packages contained sulphate of ammonia instead of sewing machine needles. On the ground that the substitution could not have taken place without the intervention of some person whilst the packages were in the custody of the Corporation, the learned Judge found in the circumstances prima facie proof that the goods were stolen as a result of a wrongful or unlawful act on the part of the Corporation or its servants.

In appeal, Counsel appearing for the Corporation has argued that, in the absence of proof of negligence or of some wrongful or unlawful act on the part of the Corporation or its servants, s. 79 of the Act protects the Corporation from liability. The argument, in other words, is that this is not a case in which the principle of *res ipsa loquitur* can apply to permit negligence to be presumed, because it is only the loss which has been proved and not the time at which or the manner in which the loss

occurred. Where for instance a motor vehicle mounts a pavement and strikes a pedestrian, or where a person is injured by the fall of goods from the side of a ship, there is evidence of a fact showing the manner in which injury was actually caused to the plaintiff, and a presumption of negligence can arise from the proved fact; but the mere fact of injury, without proof of the manner in which it was caused, cannot give rise to the same presumption.

Counsel for the Corporation also argued that s. 79 of the Act is equivalent to the "owner's risk clause" in an ordinary contract of carriage, and that where such a clause is invoked, there is a burden on the plaintiff to prove actual negligence on the part of the carrier or its servants. Counsel relied in this connection on the decision of the House of Lords in *Smith v. Great Western Railway Company*[1], in which Lord Buckmaster stated the law as follows :—

> "I am unable so to regard this clause; it is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the railway company. All he has been able to show is this: he has proved the delivery of the goods in the manner that I have mentioned to the railway company's servants, and he has put in evidence a correspondence between himself and the railway company, and their answers to certain interrogatories."

If then the only basis of the liability of the Corporation is to be found in s. 79 of the Act the burden lay on the plaintiff to prove some negligent or wrongful or unlawful act as being the cause of the loss of his goods; and if so his inability to adduce such proof must result in the dismissal of his action.

For an alternative cause of action, the plaintiff pleaded that the Corporation, having had the custody, control, charge, and care of the two cases, was under a legal duty or obligation to look after and deliver the

[1] *(1922) 1 A. C. 178.*

cases to the plaintiff in good and proper order and that the Corporation was liable for the breach of this duty or obligation. The learned Judge however, has not answered issue No. 4 (*a*) which raised the question whether the Corporation took the cases into custody on an express or implied contract to land, warehouse and deliver the cases to the plaintiff; and the answer to issue No. 10 shows also that the learned Judge regarded the case as being one only of a breach by the Corporation of a duty imposed on it by the Act. Thus the learned Judge has not held that there was any express or implied contract for the breach of which the Corporation is liable.

Despite the fact that the trial Judge has not held in this case that there was an express or implied contract between the plaintiff and the Corporation, Counsel for the plaintiff has argued that there was ample evidence upon which to find that there was here an implied contract upon which the Corporation assumed the obligations of a common carrier or carrier by trade, and that one of these obligations was to store the goods in the warehouse and to be responsible for their care and custody while in the warehouse.

The evidence referred to in this connection may be summarized as follows :—

(*a*) in respect of each Warehouse there are in attendance during the day a number of officers and servants of the Corporation, such as a Unit Supervisor apparently supervising the Corporation's activities on a wharf or Quay, a Storekeeper who checks goods at the time of their deposit in the Warehouse and at the time of their delivery out of the Warehouse; delivery checkers to check goods in the Warehouse before delivery out; and workers who perform the tasks of stacking, weighing and opening packages, of moving packages to other places as and when required by the Customs authorities, and of carrying and loading packages for the purpose of delivery out of the Warehouse and of the port premises;

(*b*) these officers and servants are on duty at all times throughout the day, and it is claimed that they are in a position to see that goods in the Warehouse are not stolen, damaged or tampered with at such times;

(*c*) the Corporation recovers charges from consignees for handling goods from the time of commencement of discharge from ships and until the time of their removal from the Port premises.

While admitting that the Warehouses are locked by Customs authorities at fixed times in the evening, that the keys of the warehouses are in the custody of those authorities, that the Customs and the Police perform the duty of guarding warehouses during the night, and that the Corporation has no responsibility for the safe custody of goods between the hours

of 4.30 p.m. and 7.30 a.m., Counsel nevertheless argued that the facts sufficed to establish that the Corporation does assume liability for safe custody during the day and that this liability is equivalent to the liability of a warehouseman who stores goods for reward. On this basis, Counsel argued that the Corporation must be held liable for negligence in this case because no evidence was led to establish that the Corporation or its officers and servants took due care and precaution for the safe custody of the plaintiff's goods while they were in the warehouse. There being in these circumstances an implied contract for the safe custody of the goods, it was urged that s. 79 of the Act does no more than state the ordinary obligation of a warehouseman for reward, and that a breach of that obligation was established by proof of the loss of the goods, and in the absence of proof of due care and precaution on the part of the Corporation.

In regard to the fact that the Corporation does not have custody and control of goods in a Warehouse during night hours, it was argued that the presumption of regularity must apply to establish that the warehouse was duly locked and guarded at night, and that in the absence of any evidence showing that there had been any tampering with the warehouse itself or its locks, the possibility of pilferage at night was excluded. On these grounds it was urged that the learned trial Judge should have found that the pilferage in this case occurred during the day, that is to say at a time during which the Corporation did have effective custody of the goods in the warehouse.

I have to consider therefore whether in all the circumstances it is reasonable or possible to infer that the Corporation did have effective custody and control of these goods, and did impliedly undertake the obligation to keep the goods in safe custody at least during the day.

A similar question was considered in the case of *Asana Marikar v. Livera*[1]. In that case a Landing Company had the exclusive privilege of landing goods from a particular line of steamers and accordingly landed all the goods consigned to the Port of Colombo which arrived on one such steamer, including a package of umbrellas consigned to the plaintiff. The package was duly deposited in a warehouse indicated by the Collector of Customs, but when the plaintiff went to obtain delivery he could not find the package of umbrellas, and he sued the Company for the value of the package. It is useful for present purposes to cite at length from the judgment of Layard C.J. :—

> " . . . There appears to have been an express agreement with the owners of the Clan Line of Steamers that the defendant should land all goods arriving in their ships and should deliver them at the Customs premises. The defendant is not a warehouseman. All goods landed by him appear from the evidence to be warehoused by the Customs authorities, who receive them into their warehouse and there detain

[1] *(1903) 7 N. L. R. 158.*

them until the Government dues are paid. That the Customs authorities (i.e., the Crown) are the real warehousemen is evidenced by the fact that they make a charge for warehousing if the goods are not removed in three days.

It is argued for respondent in this case that, though there is no express contract upon which the defendant could be sued by the plaintiff, there is an implied contract to land, warehouse, and deliver to the plaintiff. It seems to me doubtful whether any such contract can be implied at all in this particular case. The defendant was acting under an express contract with the shipowners, the Clan Line. It is suggested that, because he paid the defendant the landing charges, an implied contract arises not only to land the goods and deliver them to the Customs authorities, but subsequently to deliver them from the Customs warehouse to the plaintiff. Is such the case? Say the plaintiff had demanded his goods from the defendant, merely tendering him the amount due for landing, could he have compelled the defendant to deliver to him the goods? Certainly not. There might be freight due on the goods, and until such freight was paid the goods would be under lien to the shipowner, and the plaintiff could not demand delivery of his goods by merely paying the defendant's charges for landing. Assuming there was an implied contract of some kind between plaintiff and defendant, what was it? According to defendant's evidence, when he undertakes to clear and deliver goods to consignees he enters into a special agreement with them. In those cases he pays all the harbour dues, duty, &c., and sends the goods on to the consignees. He acts then as agent of the consignees, and takes upon himself the duty of clearing the goods at the Customs and of delivering the goods to the consignees. Did the defendant undertake the duty of warehouseman until plaintiff came to take delivery? The evidence shows that the practice is that, on a consignee taking delivery at the Customs, one of the defendant's servants fills up a cart note and signs it, and this is countersigned by the Government landing waiter if he is satisfied that all Government dues have been paid but the landing waiter deposes that a cart note alone signed by him would be sufficient authority to pass out goods, whereas one signed by defendant's servant alone would not. The Custom House authorities could not make a charge for warehousing if they are not the actual warehousemen. The presence of watchers of the defendant as well as his store-keeper in each warehouse where he landed goods, it is argued, shows that he is the real warehouseman. This is explained by the defendant to be done for the purpose of recovering the landing charges and also for securing the safe custody of those goods which he had expressly contracted to deliver. His watchers were only there by day; at night he had no means of controlling or safeguarding the goods of which, it is said, he was bailee. The contention that goods could not be stolen at night except by the Collector of Customs, in which case the Crown would be responsible, depends upon a mere assumption. Why should not the place be broken into? Moreover,

if the defendant and not the Crown were the bailee, the defendant would be liable no less if the goods were stolen by a servant of the Crown, e.g., the Collector of Customs, who, it is admitted, had sole control at night."

I can see no difference of substance between the practice of the Port referred to by Layard C.J. and the practice which now prevails. Today the Port Cargo Corporation takes the place of landing companies and performs port services. But today, as in 1903, there is a Customs landing waiter in charge of a warehouse; the landing company (now the Corporation) has its servants in a warehouse to stack and move goods; its servants participate in the delivery of goods to consignees, but no goods can be delivered without the authority of the landing waiter; a warehouse is at night exclusively under the control of the Customs authorities.

It can be said today as was said in 1903 that " the Customs authorities could not make a charge for warehousing if they are not the actual warehousemen "; that the Corporation has no means of controlling or safeguarding the goods at night, and that goods can well be stolen at night by Customs officers themselves. According to the evidence in this case there is always on duty at each warehouse at least one Customs officer, and it is he who has effective custody and control of the goods lying in the warehouse; goods cannot be removed from the warehouse except under his authority, and his authority for delivery out of the warehouse is given (as it was in fact given in this case) only after some other Customs officer passes a Bill of Entry upon payment of duty by means of the endorsement " satisfied " being made thereon.

The essential point in my opinion is that goods are detained in a Customs warehouse solely because of the requirements of the Customs Ordinance that they be so detained until Customs and harbour dues are duly paid or secured. The Customs authorities owe a duty to the State, not only to recover these dues, but to ensure that goods are not taken out of the Customs warehouse unless these dues are paid. This duty cannot be duly performed if the Customs do not in fact have continuous and effective control of goods in the warehouses. The fact of this control and the liability of the Customs for safe custody is recognised in the Customs Ordinance (now in s. 108), although that liability has always been arbitrarily (and perhaps even unreasonably) limited.

The judgment in *Asana Marikar's case* has not been disapproved of at any time. On the contrary it was followed in *The Ceylon Wharfage Co. Ltd. v. Dada*[1], and both the abovementioned decisions were followed with approval in the unreported case of *Cargo Boat Despatch Co. Ltd. v. Moosajees Ltd.* (S. C. 500/59—S. C. M. of 6th July, 1964)[2].

[1] *(1957) 59 N. L. R. 110.*

[2] *(1964) 71 N. L. R 225.*

Counsel for the plaintiff has relied on the decision in the case of *Coonji Moosa & Co. v. The City Cargo Boat Co.*[1]. The judgment of Jayetileke, J. in that case shows that he apparently misunderstood the reasons for the decision in *Asana Marikar v. Livera.* He appears to have thought that in the earlier case the goods were shown to have been lost after the Customs authorities had closed the warehouse and locked It. Indeed that was not the fact, for there was no evidence whatsoever to establish the time at which the package of umbrellas was removed from the warehouse, or could have been presumed to have been so removed. It is evident from the judgment of Layard C.J. that he relied principally on the possibility of loss at a time when the warehouse was locked and that the existence of this possibility was a factor which in his opinion negatived an implied contract for safe custody by the Landing Company.

However, even if the judgment of Jayetileke, J. be correct, the case before him was one in which there was in fact proof that the goods were actually stolen during the day. The judgment is no authority for the proposition submitted in the present case that the presumption of regularity justifies an inference that goods missing from a warehouse cannot be stolen during the night.

In the later case of *Alibhoy v. Ceylon Wharfage Co. Ltd.*[2], Justice Gratiaen pointed out that if at any time during the period when goods are in a warehouse waiting delivery to the consignees, they are exclusively within the control of the Customs authorities, the carrier's responsibility is for the time being at an end, and that " unless the matter is regulated by special agreement the question as to who was in effective control of the goods at the time of their loss or deterioration is always the deciding factor ". I find nothing in this statement which might support the proposition that goods missing from a warehouse can be presumed, in the absence of evidence to the contrary, to have been removed from the warehouse during the day.

Gratiaen J. did however admit the possibility that goods in a warehouse can remain under the carrier's control as a bailee or custodian for hire, and that if so, the same duty of *exacta diligentia* is imposed on the carrier. This opinion, that Landing Companies at the Port of Colombo may sometimes assume the obligations of a custodian for hire, was I think justified by practice which at sometimes did prevail in the Port. At one time it would appear that a warehouse might have been assigned exclusively for the deposit of goods landed by a particular Landing Company, and according to statements in some judgments of this Court, it would appear that in such a case the Landing Company would assume a responsibility to the Customs for the custody of goods and for the due payment of the duties thereon. In such a situation a Landing Company might in some cases have contracted with consignees to keep the goods in safe custody and thus assume the liability of a bailee. Again, in *Asana Marikar's case,* there was apparently evidence that a Landing Company

[1] *(1947) 49 N. L. R. 35.* [2] *(1954) 56 N. L. R. 470.*

did sometimes assume liability for safe custody of goods even while detained in a Queen's warehouse. But the reference to this matter in the judgment of Layard C.J. shows that this liability was assumed only by *special agreement*. Gratiaen J. also used the same expression in a similar context. But in the present case the plaintiff did not even attempt to prove any " special agreement " by which the Corporation undertook liability for care and custody even during the day. Indeed, having regard to the fact that the Port Cargo Corporation is a body established by Statute, I doubt whether the Corporation has power validly to undertake the liability of a custodian for hire.

Counsel for the plaintiff argued that the power conferred by s. 5 (1) (*g*) would authorise the Corporation to enter into such a contract. I am much inclined to the opinion that s. 79 of the Act would prevent the Corporation from assuming by contract a liability more wide in respect of goods lodged in the Customs warehouse than the liability referred to in that section. While s. 5 (1) (*g*) confers on the Corporation a general power to enter into contracts, s. 79 is a special provision which limits the liability of the Corporation for loss or damage to goods discharged from ships by the Corporation and thereafter deposited in a Government warehouse.

I must now refer to an alternative argument of Counsel for the defendant.

The learned trial Judge observed that it is reasonable to infer that the machine needles had been removed from the case on shore rather than on the vessel. Counsel for the defendant sought to canvass this finding as the evidence was meagre. He submitted also that there is no proof that when these cases were despatched from Germany they contained needles. He relied in this connection on the latter P4 dated 18th December 1962 addressed by the plaintiff to Delmege Forsyth & Co. Ltd. where it is stated that " the above two cases have been landed on 11th December 1962 in D. Q. 2 Warehouse. *All the bands of the cases were intact.* But while the cases were removed for loading into the lorry our wharf clerk found ammonia pouring out from the cases . . . . and the cases are found to contain ammonia, empty gunny sacks and timber pieces instead ".

It is noteworthy that no ' bad cargo sheet ' has been produced in evidence and the trial Judge has made note of this fact. Therefore, it may safely be presumed that the cases were intact when they were warehoused. It may well be that the writer of the letter P4 was referring to the stage of warehousing and not to the stage of detection of the ammonia pouring out.

As for the submission that there is no proof that the cases did in fact contain needles, the documents, particularly, the invoice P7 appears to afford adequate proof on the balance of evidence. An objection had been

taken to this document being marked in the absence of a representative of the exporter. This matter was considered by the District Judge and the objection was over-ruled. In the circumstances of this case we are unable to say he was wrong in doing so. Furthermore Counsel for the defendant in the District Court in the course of his address, referring to issue 2 stated that " the Court will answer in the affirmative ". At the least this statement shows that the question whether the cases contained machine needles was not seriously disputed at the trial.

Mr. Jayewardene has addressed us at length on this aspect of the case and submitted that even if there was such an admission it is open to this Court to answer this issue differently if the facts warrant it. We think it is now too late to entertain this submission.

For these reasons the appeal has to be allowed and the plaintiff's action dismissed. The plaintiff must pay to the defendant the costs of the action in the District Court, and one-half of the costs of this appeal.

WIJAYATILAKE, J.—

I have had the privilege of perusing the judgment prepared by My Lord the Chief Justice. With great respect I am in entire agreement with it. I have little to add of any value, except to make the following observations :—

The learned trial Judge was of the view that " warehousing " includes the process of taking care of the cargo warehoused as well and that decisions of Court pertaining to the liability of private landing companies will not apply in the case of the Port Cargo Corporation after 1958. This appears to be based on a wrong appreciation of the function of warehousing. There is nothing to show that the Government in creating the Port Cargo Corporation undertook a greater responsibility than private landing companies. If it did it should have been set down directly in the Act.

Section 79 speaks of lodging or depositing in any such warehouse or other place of deposit as is provided or approved by the Government. Once the Port Cargo Corporation lodges or deposits in such place it would appear that their responsibility ends. It is also significant that the Corporation deposits or lodges in places as directed by Customs. The distinction between warehouse rent and handling charges too is relevant. See document P11.

It is in evidence that the loss of the needles had been reported to the Police but no evidence has been led to show what had transpired at any inquiry held by the Police. If a charge of theft was framed against anyone it would show from whose *possession* the goods were alleged to have been taken. *Vide* section 366 of the Penal Code. In the instant case the evidence led in regard to the alleged theft of needles is nil and it would be a matter of conjecture as to when the goods were taken out of

the cases. It may well be during the day or night. Even the available evidence has not been called to throw more light on the precise nature of the custody of the goods. The wharf clerk of the plaintiff's firm G. K. Sofalas has not been called. This is a conspicuous omission. The defence too could have assisted Court by calling their store-keeper of the particular warehouse but he too has not been called. Thus it would appear that the two principal actors in this transaction are not before us.

Before I conclude I am constrained to make the observation that the present situation in the Port appears to be very unsatisfactory and the image of this Island will suffer irreparably by a continuance of the procedure now in vogue owing to the opportunity afforded for shifting responsibility when a loss occurs as in the instant case. While we are dealing with a case of needles and ammonia I might comment that the whole atmosphere of the Port is tainted with a cloud of suspicion and fraud. However, in the present state of the Law it would appear that the Courts are helpless to give relief except to draw attention to Section 79 (2) of the Act which provides for an ex gratia payment in a fit case. In my view the instant case merits consideration.

Appeal allowed.