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TRUSTEES OF PORT OF BOMBAY

v.

THE PREMIER AUTOMOBILES LTD. AND ANOTHER

February 15, 1974

[D. G. PALEKAR, V. R. KRISHNA IYER AND R. S. SARKARIA JJ.]

B *Bombay Port Trust Act* 1879—*S. 87—If a shorter period of limitation applies when there is short delivery and the plaintiffs do not know if the total bundle of goods have actually arrived at the port of delivery.*

The first plaintiff became entitled to claim a consignment of 53 bundles of mild steel plates despatched by a Japanese exporter to be delivered at the port of Bombay. The goods were discharged in the docks on 12th September 1959, into the custody of the Bombay Port Trust, the appellant. The goods were insured and the second plaintiff was the insurer. On September 19, 1959, delivery
C of the goods was applied for and was given but only 52 bundles. A week thereafter, the first plaintiff demanded the missing bundle but was put off from time to time by the appellant assuring that a search was in progress to trace the goods. From the Indian Maritime Enterprises, the agents of the Japanese vessel, the plaintiff came to know on November 7, 1959 that all the 53 bundles had been duly unloaded. The plaintiff enquired from the appellant again on December 5, 1959 whether the bundle had been landed; but the port authorities still informed that the missing bundle was still under search. Thereafter, on January 22, 1960, the appellant informed the first plaintiff that the bundle under reference had been
D out-turned as landed but missing.

Within a week thereafter, the first plaintiff asked for a non-delivery certificate and the certificate was issued on March 1, 1960 and on May 12, 1960 a statutory notice under s. 87 of the Bombay Port Trust Act, 1879, was issued and a suit was filed for the missing bundle or its value by way of damages. The defence put forward by the appellant was, that since the suit was governed by s. 87 of the Act and the cause of action having arisen on September 19, 1959, the claim is
E barred by limitation because 6 months had already passed from the time the first cause of action arose.

The second plaintiff, insurer, having paid the value of the lost articles to the first plaintiff got itself subrogated to the later's right, and they together filed the suit before the Court of Small Causes. That Court held against the appellant but the full Court in appeal reversed the judgment of the trial court and held in favour of the appellant holding that the claim was barred by limitation. The High Court, however, held in favour of the plaintiff and hence the appeal to this
F Court.

Section 87 of the Bombay Port Trust Act, 1879, provides that no suit or other proceeding shall be commenced against any person for anything done or purporting to have been done, in pursuance of this Act without one month's previous notice, and not after 6 months from the accrual of the cause of such suit or other proceeding. The question was whether the suit was for anything done or purporting to have been done in pursuance of this Act, when the action is for non-delivery of one out of 53 bundles.

G Allowing the appeal,

HELD : (1) Where a statute imposes a duty, the omission to do something that ought to be done in order completely to perform the duty, or the continuing to have any such duty unperformed, amounts to an act done or intended to be done within the meaning of a statute which provides a special period of limitation for such an act. [403 H—404 A]

Halsburys Laws of England, 3rd Ed. Vol. 24 p. 189-190, referred to.

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Therefore in the present case, the truncated limitation prescribed under the Act will apply. [415 E]

(2) Sec. 87 of the Act insists on notice of one month. This period may legitimately be tacked on to the six months period mentioned in the section (vide sec. 15(2) Limitation Act 1963. [422 G—H]

(3) The starting point of limitation is the accrual of the cause of action. Two components of the "Cause" are important. The date when the plaintiff came to know or ought to know with reasonable diligence that the goods had been landed from the vessel into the port. Two clear indications of when the consignee ought to know are :—(1) when the bulk of the goods are delivered, there being short delivery leading to a suit, and (2) 7 days after knowledge of the landing of the goods suggested in Sec. 61A. Whichever is the later date ordinarily sets off the running of limitation. [422 H—423 B]

(4) Letters of assurance cannot enlarge the limitation once the goods have landed and the owner has come to know of it. [423 B—C]

(5) Sec. 87 is attracted not merely when an act is committed but also when a omission occurs in the course of the performance of the official duty. [423C—D]

In the present case, applying the above principles, the case has to be decided against the plaintiffs and the appeal is allowed. [423D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 342 of 1972.

Appeal by special leave from the judgment and order dated the 16th September, 1972 of the High Court of Bombay in Civil Revision No. 263 of 1967.

F. S. Nariman, Additional Solicitor General of India, *P. C. Bhartari, B. R. Zaiwala* and *B. S. Bhesania*, for the appellant.

Anil B. Divan, K. S. Cooper, Vasant C. Kotwal, S. C. Agarwal and *P. D. Sharma*, for the respondents.

The Judgment of the Court was delivered by

KRISHNA IYER, J. A small cause involving a petty claim of Rs. 1147.42 has sailed slowly into the Supreme Court by special leave. Both sides—The Bombay Port Trust, appellant, and the New Great Issurance Co. (a nationalised institution), the contesting respondent—agree before us that while there is only a short point of law in the case, a large section of the business community, as well as the Port Trust, are affected by the ambiguity of the legal situation and an early pronouncement by this Court on the law of limitation applicable to consignee's actions for short delivery by the Port Trust is necessary. Is the period so brief as six months in terms of s. 87 of the Bombay Port Trust Act, 1879 (hereinafter called the Act), and if so, does time begin to run within around a week of the landing of the goods (suggested by s. 61A) of the Act ? Or, alternatively, does the longer spell allowed by the Limitation Act avail the plaintiff and the *terminus a quo* start only when the owner has been finally refused delivery ? Although the Court in this case is enquiring whether the little delay alleged legally disentitles the plaintiff to claim the value of the lost goods, it is a bathetic sidelight that the judicial process has limped along for 15 years to decide in this small, single-point commercial cause, whether a little over seven months to come to court was too late.

Pope Paul in opening the judicial year of the Second Roman Rota pontificated that delay in dispensing justice is 'in itself an act of injustice'. Systemic slow motion in this area must claim the nation's

A immediate attention towards basic reformation of the traditional structure and procedure if the Indian Judicature is to sustain the litigative credibility of the community. Indeed, even about British Justice Lord Devlin's observations serve as warning for our court system : "If our business methods were as antiquated as our legal methods, we would be a bankrupt country."

B The problem that falls for resolution by this Court turns on the subtle semantics alternatively spun by counsel on both sides out of the words "any thing done, or purporting to have been done, in pursuance of this Act, ...after six months from the accrual of the cause of such suit...." True to Anglo-Indian forensic tradition, a profusion of precedential erudition has been placed for our consideration in the able submissions of the learned advocates on both sides.
C Intricacy and refinement have marked the arguments and meticulous judicial attention is necessitated to discover from the tangled skein of case law the pertinent principle that accords with the intendment of the statute, the language used, the commonsense and justice of the situation.

A relevant diary of facts and dates will help focus attention on
D the primary legal question. The first plaintiff became entitled to claim a consignment of 53 bundles of mild steel plates despatched by a Japanese exporter to be delivered at the port of Bombay. The goods were discharged in the docks into the custody of the Bombay Port Trust (the defendant, and now the appellant) on September 12, 1959. The goods had been insured and the second plaintiff is the insurer.
E Within a week, that is, on September 19, 1959, delivery of the goods was applied for and was given but of only 52 bundles. A week thereafter, the first plaintiff demanded the missing bundle, but was tentalisingly put off from time to time by the defendant by letters of September 29, October 10, and December 4, 1959 assuring that a search was in progress to trace the goods. It is important at this stage to notice that the plaintiff's letter of September 26, 1959 sought "information regarding the whereabouts of the above bundle so as to enable
F us to clear the same at an early date". The broad implication is that at that time the first plaintiff had no idea where the missing bundle was—in the vessel or the port. It is not unreasonable to infer that he did not then know, for sure, whether the undelivered item had been landed from the ship at all. None of the three letters by the defendant stated firmly that it had been discharged into the port, and
G it is quite on the cards that part of the total consignment had not been discharged into the port, in these any thing-may-happen days of expect the unexpected. Significantly, the first plaintiff inquired of the Indian Maritime Enterprises, the agents of the Japanese vessel, whether the entire consignment of 53 bundles had been duly landed. The reply received by the first plaintiff is meaningful in that the Indian Maritime Enterprises in their letter dated November 7, 1959, told the
H first plaintiff that all the 53 bundles had been duly unloaded. It inevitably follows that the earliest date when we can attribute to the plaintiff clear knowledge of the port authorities having come into possession of the missing bundle was November 7, 1959. Of course,

the Inquiry Section of the Alexandra Dock of the defendant indifferently informed the first plaintiff even on December 4, 1959 that the missing bundle was still under search and a definite reply regarding the 'out-turn' of that item could be given only later when loading sheets were fully checked. However, the first plaintiff by letter dated December 5, 1959 wrote to the port authorities that he had been informed by the agents of the vessel (The Indian Maritime Enterprises) that the entire 53 bundles had been landed and desired "to please let us know immediately whether the bundle has been landed; if landed let the information regarding the whereabouts and, if not, kindly confirm the short landings". Apparently, this was to make assurance doubly sure which could be gained only when the defendant's officials also confirmed it. Counsel for the plaintiffs, with sweet reasonableness, urges that the interested *ipse dixit* of the agents of the vessel may not by itself be sufficient to impute clear knowledge of the discharge from the ship into the port of goods of which the Port Trust disclaimed knowledge of whereabouts. Long later, on January 22, 1960, the Port Trust informed the first plaintiff "that the bundle under reference had been out-turned as landed but missing". Within a week thereafter, the first plaintiff asked for a non-delivery certificate so that he could claim from the insurers the value of the article lost. Such a certificate was issued on March 1, 1960 and on May 12, 1960 a statutory notice under s. 87 of the Act was issued, followed on June 18, 1960 by the suit for the missing bundle or its value by way of damages. The deadly defence put forward by the defendant and reiterated before us with great plausibility, was that the suit being governed by s. 87 of the Act and the cause of action having been born on and limitation commenced to run from around September 19, 1959, the claim was stale, being well beyond six months and the statutory notice of a month super-added.

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The second plaintiff, insurer, having paid the value of the lost articles to the first plaintiff got itself subrogated to the latter's right, and they together laid the suit before the Court of Small Causes. That Court held on the merits that the defendant had been negligent in bestowing the basic care which as statutory bailee it was bound to take, and on the preliminary plea of bar of limitation repelled it, taking the view that non-delivery of a consignment could not attract the shorter period prescribed in s. 87 of the Act. The decrees passed was, however, set aside by the Full Court in appeal which held the claim to fall within the ambit of the lesser limitation laid down by the Act, and so beyond time. The teetering course of the case brought success to the plaintiffs in the High Court when a single Judge upset the finding on limitation and directed disposal of the appeal on the merits. The last lap of the litigation has spurred them to this Court where learned counsel have addressed arguments principally on two facets of the plea of limitation.

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The primary question is whether the present suit is one 'for any thing done, or purporting to have been done, in pursuance of this Act'. The action is for non-delivery of one out of 53 bundles. Plaintiffs' counsel argues that an *omission* to do cannot be 'an *act done*

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A or purporting to have been done'. Again, the *failure* to do what the Act mandates the Port Trust to do, viz., to deliver consignments to owners, cannot be 'in *pursuance* of this Act'. How can the statute direct non-delivery and how can the Port officials reasonably conceive that not delivering the goods committed to their charge is in pursuance of statutory duty? The perverse verdict would then be reached that violation of a law is fulfilment thereof. Embellished by
B numerous rulings, Shri Cooper strove to convince us of the substance of the further link in the chain of his case that the cause of action for recovery of the value of the lost article could not spring to life before the knowledge of the landing and loss was brought home to the plaintiff. How can a party, other than one with uncanny powers of extra-sensory perception, sue for recovery from a bailee of com-
C pensation for loss of goods at a time when he is ignorant of the key fact that they have come into the latter's hands and have been lost? In short, for a cause of action for non-delivery by the bailee to materialise, scienter that there has been delivery to the bailee and that it has since become non-deliverable while in his custody, is a *sine qua non*. Otherwise, suits for loss of goods would be some sort of a blind man's buff game.

D The Additional Solicitor General, armed with many decisions, Indian and English, parried the thrust by urging the rival position that an act includes an omission in circumstances like the present, that an official may contravene the duty laid under an Act and may yet purport to act under it, so much so delivery of 52 out of 53 bundles, impliedly omitting to deliver one item, is in pursuance of the statutory scheme of accepting the cargo discharged from the vessel, warehousing
E them and making them available for delivery to consignees. In his submission, to dissect the integral course of statutory performance and to pick out a minor component of 'omission' as constituting the infringement of the owner's right which has given rise to the cause of action, is to misread the purpose and to re-write the effect of s. 87 and similar provisions in many statutes calculated to protect public officer and institutions on a special basis. He further contends that
F even if, theoretically speaking, knowledge of the landing of the goods may be an ingredient of the cause of action, correspondence between the bailee and the owner regarding search for the landed goods is no ground to postpone the accrual of the right to sue, and when in a large consignment the bulk of it is delivered on a certain date the few undelivered items should also be reasonably presumed as having been
G landed and ready to be handed over, thus bringing into being, on such short delivery, the 'cause' to sue. Likewise, when the rules specify a week of the landing (vide s. 61A) within which the owner is expected to take charge of the goods—and the Port Trust is absolved from liability thereafter—that is indication of the reasonable limit of time for delivery. Limitation begins to run when the goods should reasonably have been delivered, ignoring operations for tracing the
H missing goods. The absurd result would otherwise be that the right to sue would flicker fitfully as the search for the last bundle is protracting and the Port Trust can indefinitely put off a claimant's suit by persisting in vain searches for the pilfered article and sending soothing

letters that efforts to trace are 'in progress'. And more sinister is the possibility of owners of considerable consignments, by oblique methods, getting letters of promise of search despatched by Port officials and thus postpone the time for taking delivery, thereby saving immensely on warehousing charges which are heavy in big cities. Corruption spreads where such legal construction protects. A

The proponents of both views have cited rulings in support but the sound approach of studying for oneself the sense of s. 87 prompts us to set it out together with other cognate sections, get the hang of the statutory scheme and read the plain meaning of the notice and limitation provisions. B

> "S. 87. No suit or other proceeding shall be commenced against any person for any thing done, or purporting to have been done, in pursuance of this Act, without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding...." C
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> . . . . . D
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> "S. 61A(1). The Board shall, immediately upon the landing of any goods, take charge thereof, except as may be otherwise provided in the bye-laws, and store such as are liable in their opinion to suffer from exposure in any shed or warehouse belonging to the Board.
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> (2) If any owner, without any default on the part of the Board, fails to remove any goods other than those stored in the warehouses appointed by the Board for the storage of duty paid goods or in warehouses appointed under section 15, or licenced under section 16 of the Sea Customs Act, 1878, from the premises of the Board within seven clear days from the date on which such goods shall have been landed, such goods shall remain on the premises of the Board at the sole risk and expense of the owner and the Board shall thereupon be discharged from all liability theretofore incurred by them in respect of such goods." E F
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> "61B. The responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge shall, subject to the other provisions of this Act and subject also in the case of goods received for carriage by railways to the provisions of the Indian Railways Act, 1890 be that of a bailee under section 151, 152 and 161 of the Indian Contract Act, 1872, omitting the words "in the absence of any special last-mentioned Act." G

Let us interpret and apply. H

Non-delivery of an article is an omission, not an act and, in any case, not one in pursuance of the Act, because the statute does not direct the Port Trust *not* to deliver the goods received from the

A ships that call at the port. This view has found favour with the High Court. With due deference to the learned Judge, we think this approach to be too literal, narrow and impractical. For, inaction has a positive side as where a driver refuses to move his vehicle from the middle of the road or even an operator declines to stop an engine or a surgeon omits to take out a swab of cotton after the operation. Omission has an activist facet "like commission, more so when there is a duty not to omit. Again, where a course of conduct is enjoined by a law, the whole process pursuant to that obligation is an act done or purporting to be done under that Act although the components of that comprehensive act may consist of commissions and omissions. A policeman acts or purports to act not only when he uses his lathi but also when he omits to open the lock-up to set the arrested free or omits to produce him before a Magistrate. The ostensible basis of the whole conduct colours both doings and defaults and the use of the words "purporting to have been done", in their natural sweep, cover the commission-omission complex.

A cognate point arises as to whether you can attribute the neglect to comply with a law as something done in pursuance of that law. Here again the fallacy is obvious. If under colour of office, clothed with the rules of authority, a person indulges in conduct not falling under the law he is not acting in accordance with the sanction of the statute or in *bona fide* execution of authority but ostensibly under the cloak of statute. It is the apparel that oft proclaims the man and whether anything is done under, in pursuance of, or under colour of a law, merely means that the act is done in apparent, though not real, cover of the statute. Broadly understood, can the official when challenged fall back, in justification, on his official trappings? A revenue officer distraining goods wrongfully or a municipal officer receiving license fee from a non-licensee is violating the law but purports to act under it. On the other hand, a police officer who collects water cess or a municipal officer who takes another into custody, is not by any stretch of language acting in pursuance of, or under the relevant Act that gives him power. And certainly not an act of taking bribe or committing rape. Such is the sense of the words we are called upon to construe. The true meaning of such and similar words used in like statutes has been set out by Halsbury correctly and concisely :

> "An act may be done in pursuance of or in the execution of the powers granted by a statute, although that act is prohibited by the statute. A person acting under statutory powers may erroneously exceed the powers given, or inadequately discharge the duties imposed, by a statute, yet if he acts *bona fide* in order to execute such powers or to discharge such duties, he is considered as acting in pursuance of the statute. Where a statute imposes a duty, the omissions to do something that ought to be done in order completely to perform the duty, or the continuing to leave any such duty unperformed, amounts to an act done or

intended to be done within the meaning of a statute which provides a special period of limitation for such an act." (3rd edn., vol. 24, pp.189-190). A

A selective reference to the rulings cited at the bar may now be made, and, although in this blurred area conflicting pronouncements have made for confusion, a systematised presentation will yield the clear inference we have reached without reference to the citations. B

In one of the earliest cases under the Highway Act, the defendant, surveyor of the perish of T., was charged with failure to remove the gravel from the highway which obstructed and caused nuisance to the public and overturned the plaintiff's carriage. It was proved that the defended was guilty of want to care in leaving the gravel there, and the questions arose whether under s. 109 of the Highway Act he was entitled to notice. Lord Denman, C.J., disposed of the matter tersely : C

"It is clear that the defendant is charged with a tort committed in the course of his official duty; he is charged, as surveyor, with the positive act of leaving the gravel on the road, where it had been improperly placed, for an unreasonable time. On that simple ground, I think it clear that he was entitled to notice." D

Patterson J. considered the same point a little more at length taking the view :

"....that the charge is not one of mere omissions, but of actually continuing the nuisance. That is a charge of doing something wrong, of keeping the gravel in an improper place, an act continued until the concurrence of the mischief. Is it then an act done in pursuance of the statute? It is not denied that the heap of gravel was put there in pursuance of the statute; it could not be spread at the same moment; the question then would arise, whether the length of time during which it was kept in a heap was reasonable or not. The continuing, therefore, was a thing done in pursuance of the statute." E F

Wightman J. struck a similar note. The learned Judge observed :

"The defendant is liable only by virtue of his office. He is charged with permitting an obstruction to remain, of which permission he is guilty in his character of an officer described in the Act of Parliament. He is, therefore, under sev 109, entitled to a notice, in order to enable him to tender amends." G

This decision rendered around 130 years ago has a modern freshness and it is remarkable that the language of the statute construed by the Judges there has a likeness to the one we are concerned with here, namely, "anything done in pursuance of or under the authority" of statute. H

A Still earlier rulings may be referred to; for instance *Palmer* v. *The Grana Junction Railway Company*(1) where the same point was ruled, but where Baron Parke said :

> "If the action was brought against the railway company for the omission of some duty imposed upon them by the Act, this notice would be required."

B In another old decision, *Poulsum v. Thirst*(2) the construction of the expression, acts "done or intended to be done under the powers of the Metropolitan Board of Works, and fell for decision. Byles, J. relied on *Newton* v. *Ellia*(3) where also a similar set of words had to be interpreted and "omitted to be done" was absent. In the case decided by Byles, J., the defendant stopped up the sewer, and C neglected to drain it, thereby causing injury. The learned Judge held that the defendant's conduct must be looked at as a whole, and that he was entitled to notice of action. The other two Judges took the same view.

Newton v. *Ellis*(4) decided in 1855 under s. 139 of the Public Health Act, 1848, for injury caused by digging a hole on the road D without placing a light or signal there, turned on the need for notice before summons. Earlier cases like *Davis* v. *Curling*(5) were referred to and the conclusion reached that though the gravamen of the charge against the defendant was the omission to place a light in the spot of danger it attracted the formula "anything done or intended to be done under the provisions of this Act"—comparable to the phraseology of the Act which came under the judicial lens in *Davis* v. *Curling* 'things E done in pursuance of or under the authority' of the Act. Coleridge, J. observed with felicitous precisions :

> "This is not a case of not doing; the defendant does something, omitting to secure protection for the public. He is not sued for not putting up a light, but for the complex act."

F Erle J. likewise said :

> "Here the cause of action is the making the hole, compounded with the not putting up a light. When these are blended, the result is no more than if two positive acts were committed, such as digging the hole and throwing out the dirt; the two would make up one act."

G Are we not concerned with a blended brew of act and omission, a complex act, a compound act of delivery-cum-non-delivery, pursuant to the statute without which the *vinculum juris* between the Board and the plaintiff did not exist?

Jolliffee v. *The Wallasey Local Board*(6) is a leading case, rightly pressed for acceptance of its ratio by the learned Solicitor General. Kesting, J., after finding for the plaintiff on negligence, focussed atten-

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(1) 4 M. & W. 749.
(2) (1867) 2 L. R. 449.
(3) 5 E. & B. 115; 24 L. J. (Q. B.) 337.
(4) 119 E. R. 424.
(5) 8 Q. B. 286.
(6) (1873) L. R. 62.

tion on the nature of the act and the need for notice. He observed : A

"As a matter of fact, therefore, I come to the conclusion that the defendants were guilty of the negligence complained of, and that that negligence was the cause of the accident; and, as matter of law, I hold that negligence to give the plaintiffs a cause of action against the local board.

But, assuming that to be so, then comes the further question, whether the defendants are not absolved from liability B in this action, by reason of the absence of a notice of action. For myself, I must express my regret that this case should be decided upon such a point; but my opinion is that the defendants were entitled to notice. This question depends upon the construction of the several Acts of Parliament which have been placed before us."

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"Now the local board was originally constituted under the Public Health Act, 1848; and it is not denied that, for anything done or intended to be done under that Act, they would be entitled to a notice of action under s. 139."

. . . . . .

"That, however, does not dispose of the matter; a further question arises, viz., whether the acts complained of here are D acts which could be done by the local board under the provisions of the Act of Parliament, so as to entitle them to a notice of action."

. . . . . .

"It has been suggested that protection is not intended to be given by clauses of this description in cases of nonfeasance. so, is clear, from the cases of *Davis* v. *Curling*, E *Newton* v. *Ellis*, *Wilson* v. *Mayor, & c., of Halifax*, and *Salmes* v. *Judge*, all of which seem to me to establish that a case of what appears to be nonfeasance may be within the protection of the Act."

. . . . . .

Brett, J, expressed himself equally unminicingly :

"Now, two objections were urged by Mr. Aspinnal. In the F first place, he says the thing complained of here is a mere nonfeasance, and therefore not "an act done." If I rightly understand the judgments in former cases, the rule is this,— where a man is sued in tort for the breach of some positive duty imposed upon him by an Act of Parliament, or for the omission to perform some such duty, either may be an act done or intended to be done under the authority of the G Act, and if so done or intended to be done, the defendant is entitled to a notice of action."

. . . . . .

"In *Wilson* v. *Mayor, & c. of Halifax*(1), Kelly, C.B., states the proposition in those terms: "It has been urged on the part of the plaintiff that the charge against the defendants is not of any act done or intended to be done, but of an omis- H sion to erect or cause to be erected a fence between the footpath and the goit, and that the omission to do an act is not

(1) Law Rep. 3 Ex. 114.

A 'an act done or intended to be done.' Some authorities have been cited on both sides: but we think that, whatever may be the construction which might be put upon the words of the statute if the question arose in this case for the first time, it is now settled by authority that an omission to do something that ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Par-
B liament, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done, within the meaning of these clauses requiring notice of action for the protection of public bodies acting in the discharge of public duties under Acts of Parliament."

"It would seem from these authorities that, where the
C plaintiff is suing in tort, nonfeasance is to be considered as "an act done," within such clauses as these."

Mr. Cooper tried to distinguish Jolliffee's case but having given our close attention to the matter we decline to jettison this weighty judgment.

D *Jolliffee's* case was followed by the Privy Council in *Queen* v. *Williams*(1). The Judicial Committee took the view that "an omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action."

E A case which went up to the Privy Council from India under the Calcutta Port Act, 1890, was decided on similar lines by the Judicial Committee in Commissioner for the *Port of Calcutta* v. *Corporation of Calcutta*(2). Lord Alness observed :

"Reliance was placed by the respondents on the case of the *Bradford Corporation* v. *Myers* [(1916) I A.C. 242].
F Now, inasmuch as that case related to the construction of the Public Authorities Protection Act (1893), which contains language not to be found in the Indian statute, and which omits language to be found in the latter, manifestly the decision falls to be handled with care. In particular, the English Act does not contain the words "purporting or professing" to act in pursuance of the statute. Their Lordships
G regard these words as of pivotal importance. Their presence in the statute appears to postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection if the work professes or purports to be done in pursuance of the statute. The English Act was properly treated by the House in the *Bradford* case as one from which the words "profession or purporting" were
H omitted, and the observations of the House must, of course, be construed *secundum subjectam materiem.*"

(1) (1884) 9 L. R. 418.

2 [1937] 64IA 363; 371.

In a different context though, the Privy Council had to deal with a similar provision, namely, s. 197 of the Criminal Procedure Code, in the well-known case of *Gill* v. *The King*(1). Lord Simonds, speaking for the Board, explained the position of law thus :

> "A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

It may be mentioned even here that the Judicial Committee had distinguished *Bradford Corporation* v. *Myers*(2) on which considerable reliance was placed by Shri Cooper and also in several decisions which took the opposite point of view. We need make no comments on that decision except to state that for exceedingly excellent reasons the Judicial Committee has put that ruling out of the way.

Shri Cooper brought to our notice the circumstance that Public Authorities Protection Act, 1893, brought in 'neglect and default', which became necessary only because "any act done in pursuance.... of any Act of Parliament...." would not otherwise comprehend omissions and defaults. We are not impressed with this submission and decline to speculate why a change of language was made if the law packed "omission" into "act".

Gill v. *The King* (supra), just referred to, affirms the careful analysis of the authorities by Varadachariar, J., in *Hori Ram Singh* v. *The Crown*(3) and also the ratio in *Huntley's*(4) case. In *Hori Ram's* case, which related to the construction of s. 197 of the Criminal Procedure Code and s. 270(1) of the Government of India Act, Varadachariar, J., brought out the true meaning of the words "act done or purporting to be done in the execution of his duty". The learned Judge observed :

> "Apart from the principle that, for the purposes of the criminal law, acts and illegal omissions stand very much on the same footing, the conduct of the appellant in maintaining the accounts, which it was his duty to keep, has to be dealt with *as a whole* and the particular omission cannot of itself be treated as an offence except as a step in the appellant's conduct in relation to the maintenance of the register which it was his duty correctly to maintain."

Stress was laid rightly by the learned Judge on the relevance of public interest in protecting a public servant and in restrictions being placed on an aggrieved citizen seeking redress in a court of law, to point out

(1) [1948] 75 I. A. 41; 59-60.
(2) [1916] I A. C. 242;
(3) [1939] F. C. R. 159.
(4) [1944] F. C. R. 252.

A that acts which have no reference to official duty should not come within the protective umbrella of these statutory provisions. The learned Judge insisted that "an act is not less one done or purporting to be done in execution of a duty because the officer concerned does it negligently." The true test, if we may say so with great respect, is whether the conduct of the public servant or public body, viewed *as a whole,* including as it may 'omissions' also, be attributed to the exercise of office.

B

Sri Cooper reinforced his contrary argument by reliance on the case of *Revati Mohan Das* v. *Jatindra Mohan Ghosh*(1) which dealt with s. 80 of the Civil Procedure Code. That decision, however, is distinguishable and relates to an optional act or omission of a public officer where it could not be designated that the failure to pay the debt by a manager was an 'illegal omission' constituting an 'act' under s. 3 of the General C Clauses Act.

A decision of the Calcutta High Court (*Commissioner for the Court of Calcutta v. Abdul Rahim OOsman & Co.*(2), turning on the construction of a similar provision (s. 142 of the Calcutta Port Act) covers the various decisions, Indian and English, and after pointed reference to *Amrik Singh's* case reaches the conclusion :

D

> "There must be a *reasonable connection between the act and the discharge of official duty;* the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

The Bench proceeded to set out the following propositions which meet with our approval :

E

> (a) In order to apply the bar under sec. 142 of the Calcutta Port Act, it is first to be determined whether the act which is complained of in the suit in question can be said to come within the scope of the official duty of the person or persons who are sought to be made liable. This question can be answered in the affirmative where there is a reasonable connection between the act and the discharge of the official duty.

F

> (b) Once the scope of the official duty is determined, sec. 142 will protect the defendants not only from a claim based on breach of the duty but also from a claim based upon an omission to perform such duty.

> (c) The protection of sec. 142 cannot be held to be confined to acts done in the exercise of a statutory power but also extends to acts done within the scope of an official duty."

G

The case dealt with was also one of short delivery and consequent loss of a part of the goods, and the suit was dismissed for being beyond the short period of limitation prescribed under the special Act.

Again, in *District Board of Manbhum* v. *Shyamapada Sarkar*(3) the H Bihar Local Self-Government Act containing a provision analogous to

(1) [1934] 61 I. A. 171. (2) 68 Cal. Weekly Notes 814.
(3) A. I. R. 1955 Pat. 432.

what we are concerned with here was construed by a bench of that Court reading the words "anything done under this Act" to include "anything omitted to be done under the Act", and further that 'anything done under this Act' necessarily and logically embraces anything wrongfully done or wrongfully omitted to be done. A

In *Gorakh Fulji Mahala* v. *State*(1), Chandrachud, J., as he then was, made an elaborate study of a comparable provision in the Bombay Police Act (s. 161) and followed the Federal Court decisions already referred to by us, as well as this Court's decision in *Shreekantiah Ramayya Munipalli* v. *State of Bombay*(2). The learned Judge summed up the law thus : B

> "The decisions cited above have uniformly taken the view that in an act cannot be said to be done under colour of office or under colour of duty or in the purported execution of official duties unless there is a reasonable connection between the act and the office. A view has also been taken in these decisions that one of the tests for determining whether an act has been done in the purported discharge of official duties is whether the public servant can defend his act by reference to the nature of the duties of his office if he is challenged while doing the act." C D

A few more decisions, apart from what has already been referred to by us, specifically dealing with similar causes of action under similar statutes, *viz.*, the Calcutta Port Act and the Madras Port Trust Act, have discussed the problem before us. *In Madras Port* v. *Home Insurance Co.* (3), a Division Bench of the Madras High Court adopted the wider view and held : E

> "The services which the Board has to perform and could perform statutorily under the statutory powers and duties cannot be dissociated from its omissions and failures in relation to the goods. Any action which is called for will properly be covered by the words 'anything done or purporting to be done in pursuance of this Act'. Under the Madras General Clauses Act, 1891 words which refer to the acts done extend also to illegal omissions." F

Natesan, J., relied on *Calcutta Port Commissioner* v. *Corporation of Calcutta*(4), where the Judicial Committee had stressed the ampler sense of 'purporting or professing to act in pursuance of the statute' and observed : G

> "Their Lordships regard these words as of pivotal importance. Their presence in the statute appears to postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute." H

(1) I. L. R. [1965] Bom. 61.
(2) [1955] 1 S. C. R. 1177.
(3) A. I. R. 1970 Mad. 48; 57-58.
(4) A. I. R. 1937 P. C. 306.

A The whole issue is clinched in our view by the final pronouncement of this Court in *Public Prosecutor Madras* v. *R. Raju*(1). The interpretation of s.40(2) of the Central Excise and Salt Act, 1944 and the antithesis argued between 'act' and 'omission' provoked a panoramic survey of the Indian statute book. Reference was made to *Pritam Singh's*(2) case where absence from duty at the time of the roll call was held to be *something done* under the provisions of the Police Act. *Maulad Ahmad's*(3), case was relied on as fortifying this view, for there too a Head Constable who made false entries in a General Diary of the Police Station was held entitled to invoke the 3 months limitation under s. 42 of the Police Act since the act complained of was the non-discharge of duty in keeping a regular diary. Even filing false returns by a sales tax assessee was held in *Sitaram* v. *State of Madhya Pradesh*(4) as an act done *under* the Berar Sales Tax Act whereunder a prosecution for such an act had to be brought in three months. The *ratio decidendi* is set out by Ray, J. (as he then was) thus :

> "25. These decisions in the light of the definition of the word 'act' in the General Clauses Act establish that non-compliance with the provisions of the statute by omitting to do what the act enjoins will be anything done or ordered to be done under the Act. The complaint against the respondents was that they wanted to evade payment of duty. Evasion was by using and affixing cut and torn banderols. Books of accounts were not correctly maintained. There was shortage of banderol in stock. Unbanderolled matches were found. These are all infraction of the provisions in respect of things done or ordered to be done under the Act.
>
> 26. In *Amalgamated Electricity Co.* v. *Municipal Committee, Ajmer* [(1969) 1 S.C.R. 430] the meaning of 'omission' of a statutory duty was explained by this Court. Hegde, J., speaking for the Court said "The omission in question must have a positive content in it. In other words, the non-discharge of that duty must amount to an illegality". The positive aspect of omission in the present case in evasion of payment of duty. The provisions of the Act require proper affixing of banderols. Cut or turn banderols were used. Unbanderolled match boxes were found. These provisions about use of banderols are for collection and payment of excise duty. The respondents did not pay the lawful dues which are acts to be done or ordered to be done under the Act."

We readily concede that it is oversimplification to state that no court has taken the contrary view, both on the question of act not including an omission and action contrary to the behest of the statute not being done pursuant to or under the statute. An exhaustive consideration of these twin propositions is found in *Zila Parishad v. Shanti Devi*(5).

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(1) A. I. R. 1972 S. C. 2504. (2) [1971] 1 SCC 653.
(3) [1963] Supp. 2 S. C. R. 38. (4) [1962] Supp. 3 S. C. R. 21.
(5) [1969] 1 S. C. R. 430.

Seemingly substantial support for Shri Cooper's contention is derived from observations in *State of Gujarat* v. *Kansara Manilal Bhikhala*(1), where, rejecting a plea of protection under s. 117 of the Factories Act, 1948, by an occupier of a factory who had violated the duties cast on him, Hidayatullah, J. (as he then was) observed :

> "But the critical words are "any thing done or intended to be done" *under the Act*. The protection conferred can only be claimed by a person who can plead that he was required to do or omit to do something under the Act or that he intended to comply with any of its provisions. It cannot confer immunity in respect of actions which are not done under the Act but are done contrary to it. Even assuming that an act includes an omission as stated in the General Clauses Act, the omission also must be one which is enjoined by the Act. It is not sufficient to say that the act was honest. That would bring it only within the words "good faith". It is necessary further to establish that what is complained of is something which the Act requires should be done or should be omitted to be done. There must be a compliance or an intended compliance with a provision of the Act, before the protection can be claimed. The section cannot cover a case of a breach or an intended breach of the Act however honest the conduct otherwise. In this connection it is necessary to point out, as was done in the Nagpur case above referred to, that the occupier and manager are exempted from liability in certain cases mentioned in s. 101. Where an occupier or a manager is charged with an offence he is entitled to make a complaint in his own turn against any person who was the actual offender and on proof of the commission of the offence by such person the occupier or the manager is absolved from liability. This shows that compliance with the peremptory provisions of the Act is essential and unless the occupier or the manager brings the real offender to book he must bear the responsibility. Such a provision largely excludes the operation of s. 117 in respect of persons guilty of a breach of the provisions of the Act. It is not necessary that *mens rea* must always be established as has been said in some of the cases above referred to. The responsibility exists without a guilty mind. An adequate safeguard, however, exists in s. 101 analysed above and the occupier and manager can save themselves if they prove that they are not the real offenders but who, in fact, is".

It is obvious that this ruling can hardly help, once we understand the setting and the scheme of the statute and the purpose of protection of workers ensured by casting an absolute obligation on occupiers to observe certain conditions. The context is the thing and not verbal similitude.

In a recent ruling of this Court in *Khandu Sonu Dhobi* v. *State of Maharashtra*(2), Khanna, J., while repelling a plea of immunity from

(1) [1965] 1 I. L. R. All. 783. (2) [1972] 3 S. C. R. 510.

A prosecution put forward by the accused on the score of limitation and the case being "in respect of anything done or intended to be done under this Act" (The Bombay Land Improvement Scheme Act, 1942) said :

> "This contention, in our opinion, is devoid of force. Sub-section (2) refers to suit or prosecution against a public servant or person duly authorised under the Act in respect of
B anything done or intended to be done under the Bombay Land Improvement Schemes Act. It cannot be said that the acts of the accused-appellants in preparing false documents and in committing criminal breach of trust in respect of the amount of Rs. 309.07 as also their act of criminal misconduct were done under the Bombay Land Improvement Schemes Act. Sub-section (2) of section 23 deals with anything done or in-
C tended to be done under the above mentioned Act by a public servant or a person duly authorised under the Act. It has no application where something is done not under the Act even though it has been done by a public servant who has been entrusted with duties of carrying out improvement schemes under the above mentioned Act. The impugned acts of the appellants in the present case were not in discharge of
D their duties under the above mentioned Act but in obvious breach and flagrant disregard of their duties. Not only they did no rectification work for the Bundh which was a part of the improvement scheme, they also misappropriated the amount which had been entrusted to them for the purpose of rectification."

E How slippery and specious law and logic can be unless the Court is vigilant is evident from this kind of defence ! Here is a case not of performing or omitting to perform an official act in the course of which an offence is committed. On the contrary, an independent excursion into crime using the opportunity of office without any nexus with discharge of official function is what we have in that case. The Court significantly highlights the fact that 'not only they did no rectification work
F for the Bundh....they also misappropriated the amount....entrusted to them for the purpose of rectification.' We hope no policeman can shelter himself after a rape of an arrested woman or shooting of his own wife on the pretext of acting under the Police Act. Immunity cannot be confused with toxicity—disastrous in law as in medicine. Nor can functions of office be equated with opportunities of office, without being guilty of obtuseness. This chapter of our discussion yields the conclusion
G that an act includes an omission (regardless of the General Clauses Act, which does not apply to antecedent statutes)—not under all circumstances but in legislations like the Act we are construing. Again, what is done under purported exercise of statutory functions, even if in excess of or contrary to its provisions, is done pursuant to or under the Act so long as there is a legitimate link between the offending act and the official role. Judged thus the defence by the Board fills the bill.

H

The Scheme of the statute is simple. When cargo ships call at the port, the Board constituted under the Act shall take charge of the goods landed from the vessel and store them properly (s. 61(A)(1)). The

Board cannot keep goods indefinitely, hard-pressed as any modern port is for space and facing as it does intractable problems of protection of goods. When the goods have landed the owner has to be on the alert and get ready to remove them within 7 days, after which the statutory bailee, the Board, is discharged from liability—subject, of course, to any default on the part of the Board in the matter of making the goods deliverable (s. 61A(2)). The span of statutory custody of the Board is short but during that time its obligations are those of a bailee under ss. 151, 152 and 161 of the Indian Contract Act, 1872, omitting the words "in the absence of any special contract" in s. 152 of the Contract Act (s. 61B).

If the person entitled to the goods defaults in removing them within one month of the Board coming into custody, special powers of disposal by public auction are given by s. 64A. The Act charges, the Port authorities with a wealth of functions and duties and necessarily legal proceedings follow upon the defects, defaults and other consequences of abuse of power. Even so, a public body undertaking work of the sort which a Port carries out will be exposed to an explosive amount of litigation and the Board as well as its officers will be burdened by suits and prosecutions on top of the pressure of handling goods worth crores daily. Public bodies and officers will suffer irremediably in such vulnerable circumstances unless actions are brought when evidence is fresh and before delinquency fades; and so it makes sense to provide, as in many other cases of public institutions and servants, a reasonably short period of time within which the legal proceedings should be started. This is nothing unusual in the jurisprudence of India or England and is constitutionally sound. Section 87 is illumined by the protective purpose which will be ill-served if the shield of a short limitation operates in cases of misfeasance and malfeasance but not non-feasance. The object, stripped of legalese and viewed through the glasses of simple sense, is that remedial process against official action showing up as wrong doing or non-doing which inflicts injury on a citizen should not be delayed too long to obliterate the probative material for honest defence. The dichotomy between act and omission, however, logical or legal, has no relevance in this context. So the intendment of the statute certainly takes in its broad embrace all official action, positive and negative, which is the operative cause of the grievance. Although the Act, in the present case, uses only the expression 'act' and omits 'neglect or default or omission, the meaning does not suffer and if other statutes have used all these words it is more the draftsman's anxiety to avoid taking risks in court, not an addition to the semantic scope of the word 'act'. Of course, this is the compulsion of the statutory context and it may well be that other enactments, dealing with different subject-matter, may exclude from an 'act' an 'omission'. This possibility is reduced a great deal by the definition of 'act' in the various General Clauses Acts, as including 'illegal omissions'. The leading case of *Jolliffee* v. *The Wallesey Local Board*(1) decided nearly a century ago has stood the test of time and still cunent coin, and

(1) (1873) 9 I. R. 62.

A Stroud (Stroud's Judicial Dictionary; 3rd edn. Vol. 1; page 877) has extracted its ratio thus :

> "An omission to do something which ought to be done in order to complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an B act done or intended to be done" within the meaning of a clause requiring a notice of action (Joliffe v. Wallesey, L.R. 9 C.P. 62)."

We regret the prolixity of the judgment because we appreciate brevity but it is the judicial price or tribute to the learning and length of the arguments presenting a panoramic view ot Anglo-Indian C judicial thought for which we are obliged to both counsel. Indeed, the plethora of rulings cited has been skipped here and there by a process of calculated ricochet, without omitting the more salient cases. And we are re-assured, at the end of this pilgrimage through precedents, that the soundness of the view we have taken is attested by pronouncements of vigorous judges twice three score and ten years ago, in words which 'age cannot wither nor custom stale'. Law D is a practical instrument, a working tool in a workaday world and where, as here, the effected fraction of the community is the common official, the commercial man and ordinary folk, the wiser rule of construction follows commonsense, not casuistry, context, not strictness and not subtle nuance but plain sense.

The logical conclusion of the legal study is that the short delivery of one bundle or rather the act of under-delivery in purported discharge E of the bailee's obligation under s. 61B of the Act is covered by s. 87 and the truncated limitation prescribed thereunder will apply. Of course, the statutory notice under s. 83 is a condition precedent to, although not a constituent of, the cause of action and there is some authority for the position that the period of one month may also be tacked on under s. 15(2) of the Limitation Act. In the view we take on the ultimate issue this question is immaterial. Even so, the de- F cisive date on which the decree turns and time runs has to be settled. If the Limitation Act applies, the suit, by any reckoning, is not barred but since it does not apply the critical issue is as to when time begins to run. Brushing aside technicalities and guided by the analogy of art. 120 of the Limitation Act, we think it right to hold that the cause of action for short delivery comes into being only when the consignee G comes to know that the bailment has come into existence. You cannot claim delivery from a statutory bailee till you know of the bailment, which under the Act arises only on the vessel discharging the goods into the port—certainly not before. In this species of actions, the right to sue postulates knowledge of the right. Till then it is embryonic, unborn.

A vital point, then, is as to when the first plaintiff came to know H of the goods in question having landed. The defendant says that when the bulk of the consignment is delivered on a particular date it must be presumed, unless a contrary inference on special circumstances is made out, that the undelivered part was deliverable on that date so

much so that limitation began to run from then on. Any further representation by the bailee that he was trying to trace the missing bundle would not affect the cause of action and therefore the commencement of limitation.

How can a claim be barred without being born? When, then, did the right to sue arise? It depends on what right was infringed or duty breached. Which leads us to the enquiry as to what is the statutory responsibility cast on the Board and what is the violation alleged to create the 'cause' of action. The bundle of facts constitutive of the right to sue certainly includes the breach of bailee's duties. Section 61B of the Act saddles the Board with the obligations of a bailee under ss. 151, 152 and 161 of the Contract Act in regard to loss, destruction or deterioration of goods of which it takes charge. The degree of care is fixed by s. 151 the absolvatory circumstances are indicated by s. 152 and the responsibility for loss is fastened by s. 162 if, by the fault of the bailee, the goods are not delivered or tendered at the proper time to the bailor. The proper time for delivery is as soon as the time for which the goods were bailed has expired or the purpose of the bailment has been accomplished—Sec. 160, although not in terms woven into the Port Trust Act, is impliedly incorporated, because s. 161 inevitably brings it into play. Even so, when does the time for which the goods are bailed expire? The answer is, according to the Solicitor General, when the week after landing of the goods expires—if s. 61A(2) betokens anything on this point. He urges that when the bulk of a consignment is delivered by the bailee the time for delivery of the short-delivered part must be reasonably held to have come. Finally, he submits that the time consumed by search for the landed goods cannot be added for fixing the *terminus a quo* of limitation. Assuming for arguments sake all these in favour of the appellant, one critical issue claims precedence over them. When does the statutory bailment take place and can the time for delivery to the owner of the goods arise before he knows or at least has good grounds to know that the bailment has in law come into being?

The owner must ordinarily take delivery in a week's time after landing since thereafter the Board will cease to be liable for loss, etc., save, of course, when the latter defaults in giving delivery as for instance the goods are irremovably located or physical obstruction to removal is offered by striking workers or natural calamities. Here the 7 days ended on September 19, 1959 when actually 52 out of the 53 bundles were delivered. And if the due date for delivery of the missing bundle had arisen then the suit is admittedly time-barred.

However, the learned Solicitor General rightly agrees that 7 days of unloading is no rigid, wooden event to ignite limitation and it depends on other factors which condition the reasonable time when delivery ought to be made. If a tidal bore has inhibited approach to the port it is a futile law which insists on delivery date having arrived and therefore limitation having been set in motion. The key question is, according to counsel, when ought the goods have been put in a deliverable state by the Board? If, having regard to reasonable circum-

A stances, the Port Trust did not tender delivery, the right of action for non-delivery, subject to statutory notice, arose and the calendar would begin to count the six months in s. 87. We are inclined to assent to this stand for legal and pragmatic reasons.

In Madras Port Trust case where action for loss of goods was laid, B two extreme contentions competed for acceptance. The Board argued that the goods once landed, time ran inflexibly and an absolute span of one month having expired before statutory notice was given the suit was barred. This was over-ruled by the Court (*M/s. Swastik Agency* v. *Madras Port Trust*) (1). But the opposite plea, equally extravagant, commended itself to the Court, erroneously in our view. The plea was that till the plaintiff knew of the loss, destruction or deterioration time C stood still even if many months might have rolled on after the vessel had discharged the goods. It is true that s. 87 speaks of '6 months from the accrual of the cause of such suit'. What is cause of the suit? Loss, destruction or deterioration? If so, as Ramamurti, J., has held :

> "It stands to common sense that the owner cannot be expected to file a suit before he is given access to the goods D and also an effective opportunity to examine the goods and he becomes aware of the loss or damage which had occurred to the goods. To hold that the period of one month specified in s.40(2) would commence to run even before the owner of the goods became aware of the loss or damage would result in absurd and startling results."

E The legal confusion issues from the clubbing together of the triple categories of damage. Cause of suit being destruction or deterioration while the goods are in the custody of the bailee it is correct to read as this Court did in a different situation under the Land Acquisition Act in *Harish Chandra* v. *Deputy Land Acquisition Officer*(2), knowledge of the damage by the affected party as an essential requirement of fair play and natural justice. The error F stems from visualising loss as the 'cause' of suit. The bailee is bound to return, deliver or tender. If he defaults in this duty the 'cause' of action arises. While destruction or deterioration may need inspection by the owner, it may be proper to import scienter as integral to the 'cause' or grievance. But loss flows from sheer non-delivery, with nothing super-added. Loss is the direct result, viewed through the owner's eyes, of non-return, non-delivery or non-tender G by the bailee—the act/omission which completes the 'cause' (*vide* s. 161 Contract Act). What is complained of is the non-delivery, the resultant damage being the loss of goods. We must keep the breach of duty which is the cause distinct from the loss which is the consequence. The judicial interpretation cannot take liberties with the language of the law beyond the strict needs of natural justice. So we hold that awareness of the factum of loss of goods is not a *sine qua* H *non* of the 'cause'.

(1) A. I. R. 1966 Mad. 130. (2) A.I.R. 1961 S.C. 1500.

In a stroke of skilful advocacy it was urged that when the bailee fails to return the goods it is like a suit for wrongful detention and the cause of action is a continuing one. This is an action in detention and its impact on limitation must be recognised, was the contention, strengthened by *Dhian Singh Sobha Singh* v. *Union of India*(1) and certain passages from Clerk & Lindsell on Torts (11th Edition, pages 441 and 442; paras 720 & 721). The flaw in the argument is that we are concerned with a statutory bailment, statutory action for loss due to non-delivery and not a contractual breach and suit in damages or for value of the goods bailed.

Another fascinating line of thought was suggested to extricate the plaintiff from the coils of brief limitation. When the defendant holds goods as bailee, the plaintiff may found his cause of action on a breach of the defendant's duty as bailee of the goods by refusal to deliver them upon request. *Gopal Chandra Bose* v. *Surendra Nath Dutt*(2), *Laddo Begam* v. *Jamal-ud-din*(3) and *Kupruswami Mudaliar* v. *Pannalal Sowcar*(4) were cited in support. Other rulings striking a similar note were also relied on. But we need not express any opinion on the soundness of that position for here we are dealing with a statutory liability where the plenary liabilities of a bailee cannot be imported.

Counsel for the respondents also urged that the analogy of art. 120 of the Limitation Act entitles him to reckon time from when he came to know of the facts making up the right to sue. In *Annamalai Chettiar* v. *Muthukarappan Chattiar*(5), the Judicial Committee had observed:

> "In their Lordships' view the case falls under art. 120, under which the time begins to run when the right to sue accrues. In a recent decision of their Lordship's Board, delivered by Sir Binod Mitter, it is stated, in reference to art. 120: There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted": *Balo* v. *Koklan*(6). Counsel for the appellants admitted that he was unable to specify any date at which the claim to an account here in suit was denied by the appellants. Accordingly this contention fails."

The reference to Sir Binod Mitter's observations relates to the ruling in *Balo* v. *Koklan*. The proposition is impeccable but is inapplicable if it is urged that the knowledge of the loss marks the relevant date. On the other hand, if the right to sue or the accrual of the cause of action is based on the infringement by non-delivery the knowledge must be the knowledge of the factum of bailment which takes place on the unloading from the vessel and the taking charge by

(1) [1958] S.C.R. 781.
(2) 12 C.W.N. 1010.
(3) [1920] I.L.R. 42 All 45.
(4) (1942) Mad. 303.
(5) 58 I.A. 1; 8.
(6) (1930) L.R. 57 I.A. 325.

A the Board. That is to say, it is preposterous to postulate the running of limitation from a date anterior to when the plaintiff has come to know that his missing goods have been landed on the port. *Mohammad Yunus* v. *Syed Unnisa*(1) is authority for the rule that there can be no right to sue (under art. 120) until there is an accrual of the right asserted—which as we have shown, involves awareness of the bailment. It meets with reason and justice to state that the *cause* B in s. 87 cannot arise until the consignee gains knowledge that his goods have come into the hands of the Board.

The Railways Act has spanned cases where courts have laid down legal tests for determining the commencement of limitation. Views ran on rival lines till in *Bootamal's case*(2) this Court settled the con- C flict and gave the correct lead which has been heavily relied on by the Solicitor General. Sri Cooper contested the application of the principle in Bootamal on the score that art. 31, Limitation Act, 1908, which fell for construction there, used the words 'when the goods ought to be delivered" and covers both delayed delivery and non-delivery, which were absent in s.87, and argued that even otherwise it did not run counter to the contention of the respondent. Anyway, D the Court held there as follows :

> "Reading the words in their plain grammatical meaning, they are in our opinion capable of only one interpretation, namely, that they contemplate that the time would begin to run after a reasonable period has elapsed on the expiry of which the delivery ought to have been made. The words E "when the goods ought to be delivered" can only mean the reasonable time taken (in the absence of any term in the contract from which the time can be inferred expressly or impliedly) in the carriage of the goods from the place of despatch to the place of destination. Take the case, where the cause of action is based on delay in delivering the goods. In such a case the goods have been delivered and the claim F is based on the delay caused in the delivery. Obviously the question of delay can only be decided on the basis of what would be the reasonable time for the carriage of goods from the place of despatch to the place of destination. Any time taken over and above that would be a case of delay. Therefore, when we consider the interpretation of these words in the third column with respect to the case of non-delivery, they G must mean the same thing, namely, the reasonable time taken for the carriage of goods from the place of despatch to the place of destination. The view therefore taken by some of the High Courts that the time begins from the date when the railway finally refuses to deliver cannot be correct, for the words in the third column of art. 31 are incapable of being interpreted as meaning the final refusal of the carrier to H deliver."

(1) A.I.R. 1961 S.C. 808. (2) [1963] 1 S.C.R. 70, 76, 79.

"With respect, it is rather difficult to understand how the subsequent correspondence between the railway and the consignor or the consignee can make any difference to the starting point of limitation, when that correspondence only showed that the railway was trying to trace the goods. The period that might be taken in tracing the goods can have no relevance in determining the reasonable time that is required for the carriage of the goods from the place of despatch to the place of destination."

The ratio is twofold, *viz.* (1) not when the final refusal to deliver but when the reasonable time for delivery has elapsed does limitation start; (2) correspondence stating that efforts are being made to trace the goods cannot postpone the triggering of limitation. Of course, 'reasonable' time is a relative factor and representation by the Railway inducing the plaintiff not to sue may amount to estoppel or waiver in special circumstances. We are inclined to confine *Bootamal* to the specific words of art. 39. The discussion discloses the influence of the words in columns 1 and 3 on the conclusion, rendering it risky to expand its operation. Section 87 speaks only of the accrual of the *cause*. The cause is the grievance which is generated by non-delivery. But can it be said that it is unreasonable not to be aggrieved by non-delivery if the Board credibly holds out that delivery will shortly be made and vigorous search for the goods is being made amidst the enormous miscellany of consignments lying pell mell within the Port? Do you put yourself in peril of losing your right by behaving reasonably and believing the Board to be a responsible body? We think not. We are not impressed by the argument based on *Bootamal* and the train of decisions following it, under the Railways Act. The rulings of this Court in *Union of India* v. *Amar Singh*,(1), *Governor General in Council* v. *Musaddi Lal*(2) and *Jetumull Bhojraj* v. *The Darjeeling Himalayan Railway Co.*(3) relate to the Limitation Act and the Railways Act; and, while public carriers and Port authorities may in many respects bear similar responsibility, the limitation law applicable is different. May be, some uniformity is desirable in this area of law. But we have to go by the language of s. 87 and not be deflected by analogy drawn from the Railways Act or Limitation Act with noticeable variations. Never-the-less, one of the legal lines harshly but neatly drawn in *Bootamal* lends some certainty to the 'from when' of limitation, by eliminating an impertinence-letters informing that search for the goods is under way. The snag is in linking this proffer of search to the vital ingredient in the 'accrual of the cause'. If, as *Bootamal* has correctly highlighted, the tracing process is *after* the 'cause' is complete, it is irrelevant to procrastinate limitation. This is the wider contribution of that decision to this blurred branch of the law. So much so, sheafs of letters from the Port officials that the landed goods are being tracted out or searched for are impotent to alter the date from when the crucial six-months' race with time begins. Once limitation starts, nothing—not the most tragic events— can interrupt it; for 'the moving hand writes, and having writ

(1) [1960] 2 S.C.R. 75. (2) [1961] 3 S.C.R. 647.
(3) [1963] 2 S.C.E. 832.

A moves on; not all thy tears nor piety can lure it back to cancel half a line'. This implacable start is after 'the accrual of the cause', which is when non-delivery or non-tender takes place. That event is fixed with reference to reasonable lapse of time after the unloading of the goods. Thus, if the search is to find out whether the goods have landed at all, it is integral and anterior to the 'cause'; but if it be to *trace* what has B definitely been *discharged* into the port it is de-linked from the 'cause'— *a la Bootamal.*

Such an approach reduces the variables and stops the evils of fluctuation of limitation. It is easy to fix when the vessel has discharged the goods into the port by looking into the tally sheet or other relevant documents prescribed in the bye-laws. This part of the tracing cannot C take long although it is regrettable and negligent for the Bombay Port officials to have taken undue time to give the plaintiffs even this information. On the contrary, search for the missing but landed goods in the warehouses and sheds and open spaces can be a wild goose chase honestly or as long as the consignee or port officials with dishonestly. Reasonable diligence will readily give the consignee information of landing of his goods.

D In the major port cities warehousing facilities are expensive and difficult to procure so that a consignee of considerable goods may manage to get free warehousing space within the port for as long as he wants by inducing, for illicit consideration, the port officials to issue letters that the goods are being traced out. This is a vice which adds to the sinister uncertainty of the *terminus a quo* if we accept the plea E that every letter from the port authorities that the missing goods are being traced out has the effect of postponing limitation.

We wish to make it clear however that the event which is relevant being the discharge of the goods from the ship into the port, the bailment begins when the Board takes charge of the goods and a necessary component of the "cause" in s. 87 of the Act is the know- F ledge of the owner that the goods have landed.

One small but significant argument of the Solicitor General remains to be noticed. In the search for what is the reasonable time for delivery by the bailee a pragmatic or working rules is suggested by him which we think merits consideration. When a large consignment is entrusted with the Board and the bulk of it is delivered on a particular G date it ordinarily follows that the reasonable time for the delivery of the missing part of the consignment also fell on that date. There may be exceptional circumstances whereby some items in the consignment might not have been unloaded from the ship by mistake or might be stored by error in a wrong shed mixed up with other goods so that they are not deliverable readily, or a substantial part of the goods has been taken delivery of and by the time the balance is sought to H be removed a *bandh* or strike or other physical obstruction prevents taking delivery. Apart from these recondite possibilities which require to be specially proved by him who claims that limitation has not started, it is safe to conclude that the date for delivery of the

non-delivered part of the consignment is the same as that when a good part of it was actually delivered. A

The ruling in *Trustees of the Port of Madras* v. *Union of India*, cited by Shri Cooper in this context, is good in parts. The learned judges were dealing with the short delivery by the Madras Port Trust. While pointing out that attempts made by the Port Trust to locate the goods would be no answer to the claim for delivery made by B the consignee, the Court held that the date when limitation starts in such cases is when a certificate that the missing packages are not available (Shedmaster's certificate 'C') is issued. While it is correct to say that alleged attempts by the Port officials to locate the goods which have definitely landed has no bearing on the "cause", it is equally incorrect to hold that till the certificate that the non-delivered C package is not forthcoming limitation does not begin. The true test, as we have earlier pointed out, is to find out when delivery should have been made in the normal course, subject to the fact of discharge from the ship to the port of the relevant goods and the knowledge about that fact by the consignee. In *Union of India* v. *Jutharam*(1) a single Judge of that High Court took the view that when part of the goods sent in one consignment was not delivered it is right to D hold that it should have reasonably been delivered on the same day the delivery of the other part took place. The date of delivery of part of the consignment must be deemed to be the starting point of limitation. This approach has our broad approval.

In *Union of India* v. *Vithalsa Kisansa & Co.*(2) a single Judge of Bombay High Court, while emphasizing that what is reasonable time E for delivery may depend upon the circumstances of each case, the point was made if the correspondence between the bailee and the consignee disclosed anything which may amount to an acknowledgment of the liability of the carrier that would give a fresh starting point of limitation. even as. if the correspondence discloses material which may throw light on the question of determining the reasonable time for delivery, the Court may take into account that correspondence F but not subsequent letters relating only to the tracing of the goods. This statement of law although made in the context of a public carrier's liability applies also to the Port Trust. In short, there is force in the plea that normally the date for delivery of the missing packages should be deemed to be the same as the date when another part of the consignment was actually delivered.

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We thus come to the end of the case and may formulate our conclusions, as clearly as the complex of facts permits.

(1) Section 87 of the Acts insists on notice of one month. This period may legitimately be tacked on to the six month period mentioned in the section (vide Sec. 15(2) Limitation Act, 1963).

(2) The starting point of limitation is the accrual of the cause H of action. Two components of the "cause" are important. The date

(1) A.I.R. 1968 Pat. 35. (2) A.I.R. 1971 Bom. 172.

A when the plaintiff came to know or ought to know with reasonable diligence that the goods had been landed from the vessel into the port. Two clear, though not conclusive indications of when the consignee ought to know are (i) when the bulk of the goods are delivered, there being short delivery leading to a suit (ii) 7 days after knowledge of the landing of the goods suggested in Sec. 61A. Which-
B ever is the later date ordinarily sets off the running of Limitation.

(3) Letters or assurances that the missing packages are being searched for cannot enlarge limitation, once the goods have landed and the owner has come to know of it. To rely on such an unstable date as the termination of the search by the bailee is apt to make the law uncertain, the limitation liable to manipulation and abuses
C of other types to seep into the system.

(4) Section 87 is attracted not merely when an act is committed but also when an omission occurs in the course of the performance of the official duty. The act-omission complex, if it has a nexus to the official functions of the Board and its officers, attracts limitation under s. 87.

D Judged by these working rules, the present case has to be decided against the plaintiffs. For one thing, the short delivery of one bundle of steel plates is an integral part of the delivery of the consignment by the port authorities to the consignee in the discharge of their official functions as statutory bailee. Section 87 of the Act, therefore, applies. The delivery of the bulk of the consignment took place on September 19, 1959 and more than seven months had passed after that before
E the institution of the suit. Of course, a later date, namely, November 7, 1959 (Ext. 'A') clearly brings to the ken of the plaintiff the fact that the missing bundle has been duly landed in the port. It is true that the enquiry section of the Bombay Port Trust Docks did not even, as late as December 4, 1959, give a definite reply about the "outturn" for this item. On December 5, 1959, the first plaintiff brought to the notice of the Board "that the above mentioned bundle
F has been landed and they (agents of the vessel) hold receipt from you (the Board)". The plaintiffs made an enquiry "Whether the bundle has been landed, if landed, let the information regarding the whereabouts and, if not, confirm the short-landings." Further reminders by the plaintiffs proved fruitless till at last on January 22, 1960, the port officer concerned wrote :

G "I beg to inform you that the bundle under reference has been outturned as "Landed but missing."

It was contended that the plaintiffs, for certain, came to know of the landing of the missing bundle only on January 22, 1960. We are unable to accept this plea because the first plaintiff had already got the information, as early as November 7, 1959, about the due landing of the missing item from the Indian Maritime Enterprises. Nothing
H has been suggested before us as to why this knowledge of the plaintiff should be discarded. The subsequent correspondence between the port officers and the plaintiffs was more for getting requisite documents

to follow up legal proceedings against the insurer by the consignee. In this view, the starting point of limitation arose on November 7, 1959 and the suit was instituted on June 18, 1960, a little over 10 days beyond the period of limitation. The plaintiffs thus missed the bus and we regret to decide on this technical point that the suit is liable to be dismissed but we must.

A faint plea that the Board is not a 'person' falling within s. 87 was suggested by Sri Cooper but its fate, if urged, is what overtook a similar contention before a Bench of the Madras High Court in *Trustees of the Port of Madras* v. *Home Insurance Co.*(1)—dismissal without a second thought.

It is surprising that a public body like the Port Trust should have shown remissne in handling the goods of consignees and in taking effective action for tracing the goods. It is seen that while there is a special police station inside the port, called the Yellow Gate Police Station, with six or seven officers and 200 policemen for duty by day and with about 400 policemen for duty by night, the port authorities did not care to report to the police till December 16, 1959. Three months is far too inordinate and inexcusable a delay for reporting about the pilferage of a vital and valuable item, namely, a bundle of steel plates imported from Japan by an automobile manufacturing company. While we dismiss this suit, we feel that it is not enough that the State instal police stations inside the ports; it must ensure diligent action by the officials, and if there is delinquency or default in discharging their duties promptly and smartly, disciplinary action should be taken against those concerned. In this country our major harbours are acquiring a different reputation for harbouring smugglers and pilferers and an impression has gained currency that port officials connive at these operations for consideration. Every case is an event and an index, projects a conflict of rights between two entities but has a social facet, being the symptom of a social legion. We consider that the Government and the public must be alerted about the unsatisfactory functioning of the ports so that delinquent officials may be proceeded against for dubious default in the discharge of their duties. It is not enough that diligence is shown in pleading limitation when honest citizens aggrieved by loss of their goods entrusted to public bodies come to court. The responsibility of these institutions to do their utmost to prevent pilferage is implied in the legislative policy of prescribing a short period of limitation.

Another important circumstance we wish to emphasize is that ambiguity in language leading to possibilities of different constructions should not be left to the painfully long and expensive process of being settled decades later by the highest court in the land. The alternative and quicker process in a democracy of rectification by legislative amendment should be resorted to so that private citizens are not subjected to inordinate expense and delay because the legalese in a legislation reads abstruse or ambiguous. The very length of this judgment, and of this litigation, is eloquent testimony to the need

(1) A.I.R. 1970 Mad. 48..

A for prompt corrective legislation on such small matters as have cropped up in the present case. Moreover, some uniformity in regard to statutory bailee's responsibilities, whether they be public carriers like the Railways, or strategic institutions like Ports, will give the community a sense of certainty and clarity about their rights and the duties of public bodies in charge of their goods.

B Counsel had drawn attention to the difficulties of the community where conflicting judicial currents aided by tricky words have made law chancy, and the need for this Court to clear the ground and give the lead. We are aware, with justice Jackson of the U.S. Supreme Court, that 'the judicial decree, however, broadly worded, actually binds in most instances, only the parties to the case. As to others, it is merely a weather vane showing which way the judicial wind is C blowing'. The direction of the wind, in this branch of law, is as we have projected.

We are of the view, in re-iteration of earlier expression on the same lines, that public bodies should resist the temptation to take technical pleas or defeat honest claims by legally permissible but marginally unjust contentions, including narrow limitation. In this and similar D cases, where a public carrier dissuades private parties from suing by its promises of search for lost articles and finally pleads helplessness, it is doubtful morality to non-suit solely on grounds of limitation, a plaintiff who is taken in by seemingly responsible representation only to find himself fooled by his credibility. Public institutions convict themselves of untrustworthiness out of their own mouth by resorting to such defences.

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What should be the proper direction for costs? Both the parties are public sector bodies. But the principle which must guide us has to be of general application. Here is a small claim which is usually associated with the little man and when, as in this test action, the litigation escalates to the final court wafted by a legal nicety, his financial back is broken in a bona-fide endeavour to secure a declara- F tion of the law that binds all courts in the country for the obvious benefit of the whole community. The fact that the case has gained special leave under art. 136 is *prima facie* proof of the general public importance of the legal issue. The course of this litigation proves that the fine but decisive point of law enmeshed in a conflict of precedents found each court reversing the one next below it, almost hopefully appetising the losing party to appeal to the higher forum. The G real beneficiary is the business community which now knows finally the norm of limitation they must obey. Is it fair in these circumstances that one party, *albeit* the vanquished one, should bear the burden of costs throughout for providing the occasion—not provocation—for laying down the correct law in a controversial situation. Faced with a similar moral—legal issue, Lord Reid observed :

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> "I think we must consider separately costs in this House and costs in the Court of Appeal. Cases can only come before this House with leave, and leave is generally given because some general question of law is involved. In this

case it enabled the whole vexed matter of *non est factum* to be re-examined. This seems to me a typical case where the costs of the successful respondent should come out of public funds."(1). A

"The Evershed Committee on Supreme Court Practice and Procedure had suggested in England that the Attorney-General should be empowered to issue a certificate for the use of public funds in appeals to the House of Lords where issues of outstanding public importance are involved."(2). B

Maybe, a scheme for a suitor's fund to indemnify for costs as recommended by a Sub-Committee of Justice is the answer, but these are matters for the consideration of the Legislature and the Executive. We mention them to show that the law in this branch cannot be rigid. C We have to make a compromise between pragmatism and equity and modify the loser-pays-all doctrine by exercise of a flexible discretion. The respondent in this case need not be a martyr for the cause of the certainty of law under s. 87 of the Act, particularly when the appellant wins on a point of limitation. (The trial court had even held the appellant guilty of negligence). In these circumstances we direct that the parties do bear their costs throughout. Subject to this, D we allow the appeal.

S.C. *Appeal allowed.*

(1) Gallie v. Lee.
(2) [1971] A.C. 1039, 1048.