Bombay Housing Board (Now The ... vs Karbhase Naik & Co., Sholapur on 29 January, 1975

Equivalent citations: 1975 AIR 763, 1975 SCR (3) 407, AIR 1975 SUPREME COURT 763, 1975 (1) SCC 828 1975 3 SCR 407, 1975 3 SCR 407, 1975 3 SCR 407 1975 (1) SCC 828, 1975 (1) SCC 828

Author: Kuttyil Kurien Mathew

Bench: Kuttyil Kurien Mathew, P.N. Bhagwati, N.L. Untwalia

PETITIONER:
BOMBAY HOUSING BOARD (NOW THE MAHARASHTRAHOUSING BOARD)

Vs.

RESPONDENT:
KARBHASE NAIK & CO., SHOLAPUR

DATE OF JUDGMENT29/01/1975

BENCH:
MATHEW, KUTTYIL KURIEN
BENCH:
MATHEW, KUTTYIL KURIEN
BHAGWATI, P.N.
UNTWALIA, N.L.

CITATION:
1975 AIR 763 1975 SCR (3) 407
1975 SCC (1) 828
CITATOR INFO :
D 1988 SC1791 (9)

ACT:
The Bombay Housing Board Act (69 of 1948), s. 64--'Anything done or purporting to have been done in pursuance of the Act', Scope of--Breach of contract if comes within expression.

HEADNOTE:
There was a contract between the State and the respondent, which after the passing of the Bombay Housing Board Act, 1948, was deemed to have been entered into between the appellant and the respondent, for the construction of' buildings by the respondent. Clause 14 of the Contract

provided that where any additional or altered work is directed to be carried out and no rates are entered in the Schedule of Rates in the Division, or agreed to, then. the contractor may, within 7 days of the order, give notice of the rate he intends to charge. In such a case, the Engineer-in-charge would be at liberty to cancel the order if he does not agree to the rate stated by the contractor, and get the work done by another. Where the Engineer-in charge has not cancelled the order and the contractor has commenced work and incurred expenditure, the contractor shall only be entitled to be paid at such rate as may be fixed by the Engineer-in-charge, and if the contractor is dissatisfied, he may raise a dispute about the rate and the decision of the Superintending Engineer will be final.

Clause 15 provided that the Engineer-in-charge has power to stop or to reduce the whole of the work specified in the tender or get it done by another, and the contractor has no claim to any compensation whatsoever on account of such stoppage or reduction. But, before the Engineer-in-charge could stop the work and get it done by another contractor, he should give the first contractor a written notice. The contractor shall also have no right under the clause to, claim any payment or compensation on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of the full amount of work not having been carried out, or on account of any loss due to purchase of materials or labour recruited by him. The clause further provides that the contractor shall not also, have any claim for compensation by reason of any alteration in the original specification which may involve curtailment of work as originally contemplated.

The respondent filed a suit claiming a certain sum of money with respect to certain items and the suit was decreed by the trial court except with respect to 4 items. The High Court in appeal. however decreed those items also. They were : (1) the respondent was ordered to carry out certain work with respect to the first two items and the respondent intimated his rate as required by cl. 14. The Engineer-in-charge did not cancel the order or give the contract for the extra work to any other contractor, and therefore, the High Court held that the amount due to the respondent for the extra work was to be calculated' on the basis of the rate specified in the notice; (2) the respondent was assured by the appellant that the work was to be completed in accordance with the specifications in the agreement and that no alteration would be made therein, but-in fact an alteration was made as a result of which the respondent became entitled to lesser amount and the High Court held he was entitled to the difference; and (3) the appellant represented to the respondent that the appellant would entrust the respondent with another item of work but contrary to the representation, got the work done by another

without giving notice in writing to the respondent and hence, the High Court held that the respondent was entitled to compensation.

408

In appeal. to this Court, it Was contended; (1) that with respect to the first items, in view of cl. 14, the respondent was entitled only to the rate as fixed by the Engineer-in-charge; (2) with respect to the 3rd item since the Engineer-in,charge was entitled to change the specifications, the respondent was not entitled to compensation in view of Cl. 15; (3) with respect to the 4th item no notice was necessary before getting the work done by another contractor; and (4) the suit was barred by limitation under s. 64 of the Bombay Housing Board Act, 1948, which provides a 6-month period of limitation for any suit for anything done or purporting to have been done in pursuance of the Act, because the act of entering into a contract was an act done in pursuance of the Act. and so a claim for damages for breach of the contract would come within the purview two items. [412E-F]

HELD: (1) The High Court was wrong in allowing the claim on the first two items. [412E-F]

The High Court erred in holding that cl. 14 was inapplicable. The High ,Court was also wrong in holding that if the clause was applicable it gave the Engineer-in-charge an absolute power to fix the rate and that it was unjust. Until the rates were settled by agreement the respondent was under no obligation to carry out the additional or altered work. The respondent could legitimately have said that in the absence of scheduled rates in the division for the type of work or an agreement in regard to the rates, it was not bound to carry out the additional or altered work. Merely because the Engineer-in-charge did ,not exercise his liberty to cancel the contract after receiving notice of the respondent's rate, it could not be said that there was a concluded contract 'between the parties for payment at those rates. The fact that an express power was given to the Engineer-in-charge by the clause to cancel the order if he did not agree to the rate would not mean that the failure to cancel the order ,would result in an agreement as to the rate or.rates. In the absence of some positive act on the part of the Engineer-in-charge agreeing to the rate, there was no agreement as to the rate and the respondent was not bound to carry out the work. The provision regarding fixation of rate by the Engineer-in-charge and 'by the Superintending Engineer was intended to cover cases where the notice specifying the rate was not given by the contractor, or when, even though the notice was given, the Engineer-in-charge did not cancel the order in the event of his not agreeing to the rate specified in the notice and the contractor ,commences work and incurs expenditure. [412B-E]

(2) The High Court was right in its conclusion with respect

to the 3rd item that cl. 15 had no application and that the claim was well-founded. The nature of the work was such that by altering the specification, there was not only no curtailment of work but there was in fact an increase of work involving additional cost. [413G]
(3) The observance of the condition as regards the written notice in cl. 15 was mandatory, and since no such notice was given the respondent 'was entitled to damages. [414B]
(4) The contract entered into by the Board for construction of buildings is an act done in pursuance of the provisions of the Act; and it makes no difference whether the contract was entered into with the Board or that it was deemed to 'be entered into with the Board., But the act complained of in this case by the respondent was the non-payment of the amount alleged to be due to the respondent on the basis of a breach of the contract; and that act could not be said to have been done or purported to have been done in pursuance of the Act. It could not said that the breach complained of had any reasonable connection with any duty cast upon the appellant or its agents by the Act. [415B; 417B]
The Trustees of Port of Bombay v. The Premier Automobiles Ltd. A.I.R. 1974 S.C. 923, followed.
The Municipal Borough of Ahmedabad v. Jayantilal Cheetalal Patel, I.L.R. 1947 Bom. 841, approved.
409
Athimannil Muhammad v. The Malabar District Board, I.L.R. 58 Madras 746. and Jalgaon Borough Municipality v. The Khandesh Spinning and Weaving Mills, Co. Ltd. I.L.R. 1953 Bombay 590, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 13 of 1968. From the judgment and order dated the 29th/30th January, 1963 of the Bombay High Court in First Appeal No. 51 of 1957.

S. T. Desai, D. D. Kango, P. C. Bhartari and K. J. John, for the appellant.

Sharad Manohar, B. P. Maheshwari, Randhir Jain and Suresh Sethi, for the respondent The Judgment of the Court was delivered by MATHEW, J.-This is an appeal by the defendant on the basis of a certificate against a decree passed by the High Court 'of Bombay in appeal from a decree in a suit for recovery of balance of amount due on account of extra construction work carried out by the plaintiff respondent.

The State of Bombay prepared a scheme for construction of blocks in Sholapur and invited tenders for the same. The respondent, a firm, submitted its, tender on 29-7-1948. The tender was in B-1 form, otherwise known as percentage tender. The tender was accepted on 6-12-1948 by the Labour Department on behalf of the State of Bombay. The Bombay Housing Board came into being with the passing of the Bombay Act 69 of 1948 and under s. 54 of that Act,, the above contract shall be

deemed to, have been entered into with the Board.

The order to carry out the work was issued to the respondent by the Housing Commissioner on 15-8-1948. The construction was to be completed within one year from the date of the order. The time was extended and the work was actually completed in March, 1950 and possession was taken by the appellant some time between 5-5-1950 and 30-5-1950. The amount paid to the respondent on 30-3-1951 under the final bill was accepted by it under protest. As the disputes between the parties in respect of the claims made by the respondent could not be settled by agreement, the respondent filed the suit,, claiming under 4 items, namely, A to D, a sum of Rs. 38,000-8-0.

As we are concerned in this appeal only with the claims specified in A-3, A-4, C-1 and C-2, it is not necessary to refer to the contentions of the appellant in respect of the other items. In regard to the claims in items A-3 and A-4, the appellant contended that they were for extra works carried out by the respondent without any agreement as to the rate to be charged and therefore the respondent was entitled to have the claim settled on the basis of the provision in clause 14 of the contract for such works and that claims in item C-1 and C-2 were not maintainable by virtue of clause 15 in the contract and that the suit was barred by limitation.

The trial court decreed the suit for a sum of Rs. 2,865-0-0 with proportionate cost and future interest. It dismissed the claims made under items A-3 A-4, C-1 and C-2. The respondent filed an appeal before the High Court for the balance of its claim and the appellant filed a cross appeal. The High Court decreed the claims in items A-3, A-4, C-1 and C-2 and the sole question in this appeal is whether the claims in these items were sustainable in view of clauses 14 and 15 of the contract between the parties and whether there was evidence to establish them.

The amount claimed in item A-4 was Rs. 8,239 and that was mainly in respect of the work of filling up of ditches, etc., which was done by the respondent under the order of the appellant. The order to carry out this extra work was given on 7-11-1949. The respondent intimated by notice in writing, as required by clause 14, the rate for carrying out the work. The Engineer-in-charge did not exercise his liberty to cancel the order, or give the contract for the extra work to any other contractor. The respondent's case was that the amount due to it for the extra work under item A-4 was to be calculated on the basis of the rate specified in the notice. The appellant contended that in view of clause 14 of the contract, the respondent was entitled only- to the rate as fixed by the Engineer-in-charge. So, the question for consideration in respect of item A-4 is whether, in view of clause 14 of the contract it was open to the respondent to make the claim on the basis of the rate quoted by it in the notice. Clause 14 provides:

> Alterations in specifications and designs not to invalidate contracts--
>
> The Engineer-in-charge shall have power to make any alterations in, or additions to, the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry out the work in accordance with any instructions in this connection which may be given to him in writing signed by the Engineer-in-charge and such

alteration shall not invalidate the contract; and any additional work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. And if the additional or altered work include any class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the Schedule of Rates of the Division or at the rates mutually agreed upon between the Engineer-in-charge and the contractor, whichever are lower. if the additional or altered work, for which no rate is entered in the Schedule of Rates of the Division, is ordered to be carried out before the rates are agreed upon then the contractor shall, within seven, days of the date of receipt by him of the order to carry out the work, inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, and if the Engineer-in-Charge does not agree to this rate he shall by notice in writing be at liberty to cancel his order to carry out such class of work, and arrange to carry it out in such manner as he may consider advisable, provided always that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined as lastly hereinbefore mentioned, then in such case he shall only be entitled to be paid in respect of the work. carried out or expenditure incurred by him provide (previous ?) to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute, the decision of the Superintending Engineer of the Circle will be final."

It is clear from the clause that where any additional or altered work is directed to be carried out and no rates are entered in the Schedule of Rates in the Division or agreed to, then, the contractor may, within seven days of the order, give notice of the rate he intends to charge. In such a case, the Engineer-in-charge would be at liberty to cancel the order if he does not agree to the rate stated by the contractor and get the work done by any other agency. Where, however, the Engineer-in-charge has not cancelled the order for additional or altered work and the contractor has commenced work and incurred expenditure, the contractor shall only be entitled to be paid at such rate or rates as may be fixed by the Engineer-in-charge. In any such case if the contractor is dissatisfied, he may raise a dispute about the rate or rates so fixed by the Engineer-in-charge. Where such dispute is raised, the Superintending Engineer will decide the same and his decision will be final. We do not think that the respondent was bound to carry out the additions, and alterations as there was no reply to the notice stating the rates it intended to charge. But it was free to commence and complete the work on the basis that since the rates quoted by it were not accepted, it would be paid at such rates to be fixed by the Engineer-in-charge and that if it was dissatisfied with the rate or rates fixed by the Engineer-in-charge, if could raise a dispute before the Superintending Engineer and that the time limit for completion would be extended in all cases of additions or alterations as stated in the last sub-para of clause 14. The High Court was of the view that clause 14 had no application because it thought that the respondent was bound to carry out the work

as directed by the Engineer-in-charge even when there was no agreement as regards the rate to be charged for the extra work, as the nature of work in some cases would be such that if the work was not completed at the time when the work was to be completed, the cont-

ractor would have to do much extra work over and above the actual work involved. The Court also said that clause 14 gave the Engineer-in-charge an absolute power to fix the rate and that would be unjust and therefore the Court decreed in full the amount claimed under items A-3 and A-4. We think that until the rates were settled by agreement the respondent was under no obligation to carry out the additional or altered work. The respondent could legitimately have said that in the absence of scheduled rates in the division for the type of work in question or an agreement in regard to the rates, it was not bound to carry out the additional or altered work. We are not satisfied that since the Engineer-in-charge did not exercise his liberty to cancel the order, there was a concluded contract between the parties. The failure to cancel the order for additional or altered work on receipt of the notice speci- fying the rate would not result in an agreement as to the rate to be charged. The clause only gave the Engineer-in- charge the liberty to cancel the order and get the work done by another contractor. The fact that an express power was given to the Engineer-in-charge by the clause to cancel the order if he did not agree to the rate would not mean that the failure to cancel the order would result in an agreement as to the rate or rates. The proviso in clause 14 was intended to cover cases where the notice specifying the rate was not given by the contractor, or where, even though the notice was given, the Engineer-in-charge did not cancel the order in the event of his not agreeing to the rate specified in the notice. We are of the view that in the absence of some positive act on the part of the Engineer-in-charge agreeing to the rate, there was no agreement as to the rate and that the respondent was not bound to carry out the work. In this view of the matter, we think that the High Court went wrong in allowing the claim in item A-4. The claim under Item A-3 stands on the same footing as the, claim under item A-4 and, therefore, that claim has also to be rejected;

The next question is whether the High Court was justified in decreeing the claims in items C-1 and C-2. Item C-1 was a claim for Rs. 9,000/-. The respondent's case was that there was assurance by the appellant that the work was to be completed in accordance with the specifications in the agreement and that no alteration would be made therein. According to the respondent, as per the specification, it was to do the work with 5" thick R.C.C. slab over B and B-1 type of blocks to cover an area of about 61,000 sq. ft. an, the rate at which the respondent agreed to do the work was Rs. 2-15-6 per sq. ft. The further case of the respondent was that it agreed to do the construction work after estimating the cost of the entire construction as a whole and after making a calculation of the profit and loss on that basis in different items of work and it had sustained loss because it had to do a different type of work for which it could make no estimate in anticipation. The order to carry out the work in the altered form was communicated to the respondent on 27-1-1949.

It protested against it saying that it will have to use extra quantity of iron and claimed 6 annas extra per sq. ft. over the rate for 4 1/2" slab which it had given for 'A' type block. The appellant turned down the demand and the respondent had to do the work with 4 1/2" R.C.C. slabs over the area of 24,000 sq. ft. According to the respondent, if it were to do the work with 5" slab according to the original specification over the' area of 24,000 sq. ft., it would have used 27,000 lbs. of iron as reinforcement and would have got Rs. 71,250 for the work, but, because of the reduction in the size of the slab, it was required to put in 44,000 lbs. of reinforcement and was to be paid Rs. 60,000 only. On the other hand, the appellant contended that the Engineer-in-charge was entitled to change the specification under the contract and the respondent was not entitled to claim any damage arising from the change in the nature of the work and relied upon clause 15 for this purpose. The High Court held that clause 15 had no application. We do not think that the High Court was in error. Clause 15 empowers the Engineer-in-charge to step or to reduce the whole of the work specified in the tender if he thinks it necessary to do so and the, contractor has no right to claim any compensation whatsoever on account of such stoppage or reduction in the work. The clause also provides that the contractor shall have no right to claim any payment or compensation on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of the full amount of the work not having been carried out or on account of any loss that he may be put to on account of materials purchased or agreed to be purchased or for unemployment of labour recruited by him. The clause further provides that the contractor shall not also have any claim for compensation by reason of any alteration having been made in the original specifications, drawings, design or instruction which may involve curtailment of work as originally contemplated.

In its evidence, the respondent stated that it put slabs of 4 1/2" thickness in an area measuring 24,000 sq. ft. out of an area of 61,000 sq. ft. and that it had to put 44,000 lbs.

of reinforcement instead of 27,000 lbs. and so it must be paid for the extra 17,000 lbs. a sum of Rs. 9,000/-. The High Court took the view that this involved no reduction or curtailment in the work and as the alteration involved additional cost to the respondent, it cannot be said that there was reduction or curtailment of work. 1n other words, the High Court was of the view that the nature of the work was such that there was not only no curtailment of work but an increase of work involving additional cost. We think the High Court was right in its conclusion that clause 15 has no application and that the claim was well founded. The respondent had claimed Rs. 9,097/- from the appellant in respect of item C-2. In the plaint the respondent stated that the appellant represented to it that the appellant would entrust the respondent with the pipeline work mentioned therein but that the appellant, contrary to representation, got the work done by another contractor and, therefore, the respondent was entitled to compensation for it.

423SCI/75 The High Court found that as it was provided in clause 15 that before the Engineer-in-charge could stop the work and get the work done by another contractor, he should give

the. respondent a written notice and as such a notice was not given, the respondent was entitled to damage. We see no reason to think that observance of the condition as regards the written notice was not mandatory. We see no force in the argument that the written notice was not necessary as that was specifically provided for in the clause.

The last point for consideration is whether the suit was barred by limitation as it was not brought within six months of the act complained of.

The High Court was of the view that s. 64 of the Bombay Housing Board Act, 1948 has no application as the claims were for damages for breach of contract.

Section 64 provides "No person shall commence any suit against the Board or against any officer or servant of the Board or any person acting under the orders of the Board, for anything done or purporting to have been done in pursuance of this Act, with- out giving the Board, officer, or servant or person two months' previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act Complained of."

> "And in the case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amounts so tendered and shall pay all costs incurred by the defendant after such tender."

The appellant submitted that the act of entering into the contract was an act done or purporting to have been done in pursuance of the Act and therefore, any claim for money as damages for breach of the contract by the respondent would come within the purview of the section.

The Preamble of the Act provides "Whereas it is expendient to take such measures, to make such schemes and to carry out such works as are necessary for the purpose of dealing with and satisfying the need of housing accommodation and with that object in view it is necessary to establish a Board and to make certain other provisions hereinafter appearing; It is hereby enacted as follows."

Section 19 provides that the Board may enter into all such contracts as it may consider necessary for carrying out the purposes of the Act. Section 23 (1) states that the Board may incur expenditure and undertake works for framing and execution of housing schemes. Section 23(2) says that the government may entrust to the Board the framing and execution of any housing scheme. Therefore, the Board has statutory duty to frame schemes for construction of houses and execute them. Section 24(f) would also indicate that the purpose of a scheme is construction of house. In these circumstances, we think that the contract entered into the Board for construction of buildings might be an act done in pursuance to the provisions of the Act. We will also assume that it makes no difference whether it was deemed to be entered the contract was or whether it wag deemed to be entered 54 of the Act. But the question is whether the act complained of, namely the non-payment of a claim for money based on breach of contract, was an act done or purporting to have been done in pursuance of the Act.

There can be no doubt that the act complained of by the respondent was the non-payment of money as damages or compensation resulting from an alleged breach of contract. In The Municipal Borough of Ahmedabad v. Jayantilal Chhotalal Patel(1) the Court held that when a municipality has power to enter into a contract under the Municipal Boroughs Act and the municipality purports to exercise its power to enforce such contract, any act done in the exercise of its power to enforce the contract is not in pursuance of the Act but in pursuance to the contract and, therefore, a suit brought against the municipality for return of deposit under a contract to clean the streets was not a suit of the type described in s. 206 of the Bombay Municipal Boroughs Act, 1925 which is in pari materia with s. 64 of the Act. In the course of the judgment, Chagla, J. (as he then was) observed that what the plaintiff sought to enforce was, the right which came into existence as a result of the contract entered into between the plaintiff and the municipality and not a public duty cast upon the municipality by the statute, that in forfeiting the deposit, the municipality was not acting in pursuance to the power given to 'it under statute but was doing so in pursuance of a power given to it under the contract and, therefore, the suit to enforce rights under the contract entered into with the municipality which the municipality was not under any obligation to enter into, cannot fall with the ambit of the section. We think that the decision lays down the law correctly ,and that the principle deducible from it is applicable to the facts here. Mr. S. T. Desai referred to the decision of the Madras High Court in Athimannil Muhammad v. The Malabar District Board(2) and said that the decision therein would I govern the instant case. That was a case where a suit was filed against the District Board more than six months after the date of the accrual of the cause of action, claiming damages on the ground that its President improperly cancelled a contract of lease for one year of the tolls in certain places, which was stated to have been entered into by the plaintiff with the Board through its Vice President. The President in performance of what he thought was his duty under the Madras Local Boards Act accepted a higher offer by another person and the necessary consequence of it was cancellation of the acceptance of the plaintiff's offer. It was held that though the distinction between actions on contract and actions independent of con-

(1) (I.L.R.) 1947 Bom. 841 (2) I.L.R. 58 Madras 746.

tract may be convenient enough as a working rule, the real test to be applied was whether what was complained of was some act done in pursuance of a statute. Varadachariar, J. in delivering the judgment of the Court said that the cancellation of the acceptance of the offer was the necessary result of what the President thought was his duty in accordance with the terms of the Act as he interpreted them namely to accept the highest tender and that he did this on the footing that the Vice President's acceptance of the plaintiff's tender was not in compliance with the Act. He further said that the right to collect tolls was a special privilege conferred upon local bodies by- statute and that they were authorized either to manage the collection of the tolls themselves or through their own agency or to lease them out, and that in any case what the President as representing the Board did in connection with the leasing out of the right to levy tolls was undoubtedly an act done in execution of his powers or duties under the Act.

We need not consider the correctness of this decision as, even on the assumption that it is correct, it has no application to the facts here. There the Court found that the act complained of had reasonable connection with the discharge of his statutory duty as President or at any rate, he

thought that it was his statutory duty as President to accept the highest bid. The distinction between an act done with some semblance of authority or show of right and a prima facie illegal act in this context has been clearly pointed out in the decision in Jalgaon Borough Municipality v. The Khandesh Spinning and Weaving Mills Co. Ltd. (1) where the question was whether-notice under s.206 ,of the Bombay Municipal Boroughs Act, 1925, was necessary before filing a suit to recover a sum of money on the basis of a contract. The Court held that an act which is Prima facie illegal is not within the category of acts done or purported to have been done in pursuance of that Act, and that it is only an act done under a vestige or semblance of authority or with some show of a right that would fall within the category. Bhagwati, J. in the course of his judgment said that the acts which would fall within the category of those done or purported to have been done in pursuance of the Act could only be those which were done under a vestige or semblance of authority, or with some show of a right and that the distinction between ultra vires and illegal acts on the one hand and wrongful acts on the other wrongful in the sense that they purport to have been done in pursuance of the Act is that they are intended to have been done in pursuance of the Act and are done with a vestige or, semblance of authority or sort of- a right invested in the party doing those acts.

In The Trustees of Port of Bombay v. The Premier Automobiles Ltd. (2) section 87 of the Bombay Port Trust Act, 1879, which is in pari materia with s.64 of the Act fell for consideration and the question was whether short delivery by a statutory bailee was something done or purporting to have been done under the provisions of that Act. In the course of the judgment, Krishna Iyer, J., speaking for the Court, (1) I.L.R. (1953) Bombay 590 (2) A.I.R. 1974 S.C. 923 said that a suit for damages for breach of contract would not, attract the section (see para 46 of the judgment). As we said, the act complained of in this case was the non- payment of the amount alleged to be due to the respondent on the-basis of the breach of the contract between the parties. We do not think that the act complained of could be said to have been done or purported to have been done in pursuance of the Act. By no stretch of imagination could it be said that the breach complained of had any reasonable connection with any duty cast upon the appellant or its agents by the Act.

In the result we disallow the claims of the respondent in items A-3 and A-4 set aside the decree of the High Court to that extent. We affirm the decree of the High Court in respect of the claims in items C-1 and C-2. The appeal is allowed to the extent indicated but is dismissed in other respects. We direct the parties to bear their cost in this Court.

V.P.S. Appeal allowed in part.