
(1959) 04 CAL CK 0008
In the Calcutta High Court
Case No : Suit No. 1273 of 1957

B.R. Herman and Mohatto (India) Pr. Ltd. APPELLANT
Vs
Swedish East Asia Co. Ltd. RESPONDENT

Date of Decision : 29-04-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9

Citation : AIR 1967 Cal 24

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G.K. Mitter, J.—This is an application for stay of a suit under a clause contained in a bill of lading reading "any dispute arising under this bill or lading is to be decided in Sweden according to Swedish Law."

2. The dispute relates to a shipment of 1034 bundles of M. S. Flats shipped by A. B. Cottrain of Stockholm, Sweden on April 28, 1956. The goods were loaded at Gothenburg in Sweden on the ship "Kyoto" belonging to the Swedish East Asia Co. Ltd., described in the plaint as a limited liability company incorporated under the appropriate laws of Sweden and having its office at Gothenburg in Sweden outside the jurisdiction of this court and carrying on business through its agent United Liner Agencies of India (Private) Ltd. at No. 18, Brabourne Road, Calcutta within the jurisdiction of this court. The bill of lading is dated April 28, 1956. The ship reached Calcutta within a few weeks thereafter. The plaintiffs complaint is that it received only 1020 bundles out of the consignment and the defendant failed and neglected to deliver the balance of 14 bundles of M. S. Flats. The plaintiff claims to be the endorsee of the bill of lading which contains the usual clause with regard to shipment that the particulars of weight, description etc. given thereon were furnished by the shipper, the goods being described as M. S. Flats untested Thomas quality 50 x 12 in lengths of 8" x 11" and multiples thereof with tolerance 5". the gross weight being 1458.780 Kos. They were

described as shipped on board in apparent good order and condition unless otherwise stated & were to be discharged at the port of discharge or so near to there as the vessel may safely get and be always afloat. There was a further condition reading "Weight, measure marks, numbers, quality, contents and value if mentioned in the bill of lading are to be considered unknown unless the contrary has been expressly acknowledged and agreed to. The signing of this bill of lading is not to be considered as such an agreement."

3. By the written statement filed herein the statements contained in paragraph 1 of the plaint are admitted as substantially correct. But the defendant does not admit that the bill of lading was endorsed in favour of the plaintiff or that the endorsement was for valuable consideration or that the plaintiff was the owner of the goods covered by the bill of lading. The substantial defence seems to be contained in paragraph 3 of the written statement where it is stated that "after the said cargo was discharged as aforesaid and while the same were in the custody of the port authorities it was found that as a result of insufficient packing for which the carrier owed no responsibility, several bundles had become loose. By a letter dated September 18, 1956 the plaintiff informed the defendant that the plaintiff itself would be willing to take delivery of the loose cargo in the custody of the port authorities if the defendant agreed to meet the plaintiff's claim in case the weight of the cargo as received by the plaintiff fell short of the shipped weight. In response to the plaintiff's request the defendant agreed to meet the plaintiff's claim in case there was any discrepancy between the weight of the cargo as delivered and the shipped weight."

4. The defendant denies that the cargo as received by the plaintiff was shorter in weight than the cargo shipped or that there was any failure on the part of the defendant to carry the said cargo or to deliver to the defendant any part thereof. In the same paragraph the defendant has also denied that any part of the said cargo was not delivered by the defendant and the defendant further does not admit that the plaintiff had not received any part of the cargo.

5. The present application is being made by the defendant on the ground (a) that under the bill of lading any dispute arising under it could only be litigated upon in the courts in Sweden, and (b) the Swedish courts would be the courts of convenience for the purpose of this dispute. In paragraph 9 of the petition it is stated as follows :--

"The cargo was shipped from a Swedish Port. The nature of the cargo alleged to have been shipped, and the weight thereof, the manner in which the cargo was carried during the voyage as well as the unloading thereof are matters in dispute between the parties. The said vessel does not regularly ply between Sweden & Calcutta. The officers of the said vessel who were responsible for the loading and unloading, for the loading, stowage, carriage and unloading of the said cargo and who could give evidence on these matters on behalf of your petitioner are Swedish citizens and residents of Sweden. Relevant documents viz., stowage plans, Log Books are in Swedish language and in your petitioner's office in

Sweden. It will cause great hardship to your petitioner, if your petitioner has to bring its witnesses from Sweden to Calcutta for the trial of this suit."

6. Most of these statements are denied or disputed in the affidavit-in-opposition filed herein. It is alleged therein that (a) the petitioner carries on business at 8, Brabourne Road, Calcutta within the jurisdiction of this Court through its agents, United Liners Agency of India (Private) Ltd., who is looking after this litigation and all other matters of the defendant, (b) the most material and important witnesses reside in Calcutta and it will be convenient for all parties if the suit is tried by this court, (c) the main defence in the suit being that the entire quantity of goods covered by the bill of lading was landed from the said vessel and delivered into the custody of the port authorities, the evidence as to the unloading of the goods which is available at Calcutta will form the substantial portion of the evidence in this case and all witnesses on this material issue reside and are available in Calcutta, (d) the petitioner has not shown how the Swedish courts will have jurisdiction to decide the disputes were they to be litigated on in Sweden, (e) material witnesses will be (i) witnesses from Sea Customs authorities of Calcutta who checked the steamer's manifest, documents and goods arrived by S. S. Kyoto, (ii) witnesses from Calcutta Port authorities about short lading and short delivery, (iii) witnesses from Stevedores who unloaded the goods from the Steamer at Calcutta, and (iv) witnesses from the plaintiff's Clearing Agents who effected the clearance. The respondent also relies on the fact that this application has been made at a very late stage, i.e., nearly a year and a half after the filing of the written statement, and were the plaintiff now to be compelled to go to Sweden its suit there would be barred under the laws of limitation under the Hague rules.

7. Applications of this type have become fairly frequent and I have had occasion to deal with several of them. I have already held in Suit No. 1814 of 1957 (Cal) Lakshminarain Ramniwas v. N. V. V. Vereengde Nederlandsche Scheeraartmaatschappij that the proper test in a case like this is that laid down in the case of *The Fehmarn* (1958) 1 WLR 159 viz., "Is the dispute one which properly relates to the courts in Sweden?" Having regard to the facts and circumstances of the case and particularly to the defence raised I cannot say that a Swedish court, even if it had jurisdiction, would be the forum convenient for this suit. According to the defendant all the bundles of M. S. Flats were landed in Calcutta. If the defendant succeeds in establishing the fact the plaintiff's suit will in all probability be dismissed and the only question will be whether there was any failure or negligence on the part of the plaintiff to take delivery of the M. S. Flats which had become separated from the bulk. It will be for the plaintiff to prove the damages it has suffered and with regard to that the bulk of the evidence will certainly be available in Calcutta. What evidence, if any, will be available in Sweden, is difficult to say. Possibly the shipper may give evidence as to the total weight of the goods shipped and if so, deducting therefrom the weight of the goods received in Calcutta the plaintiff may be able to prove the actual weight of the goods which it did not receive; but it appears to me that the

ship"s officers or the documents referred to in the petition will have little bearing on the issues to be raised in this suit. Considering all the facts of the case I do not think that this is a proper case where the discretion of the Court ought to be exercised in favour of the applicant. The application will, therefore, be dismissed and costs of this application will be costs in the cause.