

(1952) 04 MAD CK 0028
In the Madras High Court
Case No : C.C.C. Appeal No. 27 of 1950

British India Steam Navigation Co. Ltd.	APPELLANT
Vs	
T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram	RESPONDENT

Date of Decision : 01-04-1952

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Article 1, 6
Carriers Act, 1865 — Section 2
Contract Act, 1872 — Section 151, 152

Citation : AIR 1953 Mad 3 : (1953) ILR (Mad) 396 : (1952) 65 LW 806 : (1952) 2 MLJ 270

Hon'ble Judges : Krishnaswami Nayudu, J; Govinda Menon, J

Bench : Division Bench

Advocate : King and Patridge, for the Appellant; T.R. Arunachalam and R. Mathurbhutham, for the Respondent

Final Decision : Allowed

Judgement

Govinda Menon, J.—The defendants in O. Section No. 711 of 1943 on the file of the City Civil Court, Madras, appeal against the decree

of the learned Additional City Civil Judge awarding a sum of Rs. 1804 being the price of 44 bags of bcedi leaves short delivered to the plaintiff at

the Madras harbour from S. S. ""Howra"" in which 1532 bags of beedi leaves had been shipped for transit from Vizagapatam to Madras.

2. The plaintiffs were the consignees of 1,532 bags of beedi leaves shipped at Vizagapatam for being carried to Madras by S. S. ""Howra"". The

defendants are the British India Steam Navigation Co. Ltd. by agents Messrs. Binny and Co (Madras) Ltd who are the owners of the ship in

which these bags were carried. Out of the 1532 bags shipped at Vizag the evidence is to the effect that only 1488 bags were delivered at the

Madras harbour, 44 bags being not traceable and hence short delivered. The suit was laid for recovering the price of these 44 bags and as stated

above, the lower court granted a decree for a sum of Rs. 1804. Against that decree, the defendants have appealed. The only contest between the

parties is with regard to the liability of the defendants for the price of the 44 bags short delivered.

3. Ex. A. 30 is the Mate's receipt which shows that the 1532 bags of beedi leaves, the contents of some of the bags being exposed at the mouths,

were stowed on deck at shippers' risk. The correspondence shows that on the complaint made on behalf of the plaintiffs, the defendants tried their

utmost to find out how and where the 44 bags were lost and they were not able to find out the cause of the loss. In Ex. A. 7 dated 3rd December

1947, the defendants wrote to the plaintiffs' agent that they have made enquiries at all the ports at which the vessel called but could not trace the

bags at all. There are similar letters, Ex. A. 15 regarding the search made for the goods, Ex. A. 16 where reference was made to the Calcutta

principals and by Ex. A. 17 the defendants complained to the Traffic Manager, Madras Port Trust, that these and other missing bags of beedi

leaves must have been delivered in error to others after they were landed and the Traffic manager was requested to investigate this shortage

thoroughly. Ex. A. 18 is a further reminder to the Traffic Manager. After some correspondence between the plaintiffs and the defendants as well as

between the defendants and the Port Trust and other authorities, finally by their letter dated 14-5-1948 the defendants disclaimed their liability for

the amount and stated that they were unable to entertain the claim and accept any responsibility on the ground that the bill of lading was subject to

the shippers' risk and contained a clause that the common carrier is not liable for the loss; The clause on which the defendants rely is type-written

and is pasted at the end of the printed Bill of lading. It reads as follows.

Notwithstanding anything to the contrary herein contained live animals and/or deck cargo are received, kept and carried at the sole risk of the

owner thereof, and neither the carrier, which expression includes both the owner of the ship and the operating ship owner for the time being) nor

any stevedors, wharfinger nor any agent or servant of any of them nor any other person whomsoever for whom the carrier may be responsible shall

be under any liability, whatever for the goods, nor for any loss or expense connected therewith however caused and whether due to negligence,

unseaworthiness or otherwise. Shippers and all concerned are, therefore, advised to see that their insurance policies cover all and every risk

whatsoever whether ashore or afloat and are made without recourse to the carrier or any of the parties aforementioned".

On account of this special clause in the bill of lading, the defendants contended that the plaintiffs had notice and knowledge to the effect that neither

the carrier, nor the agent or servant, or any persons for whom the carrier may be responsible, shall be under any liability whatever for the cargo,

nor for any loss or expense connected therewith, however caused, and whether due to negligence, unseaworthiness or otherwise. The defendants

further pleaded that the loss has not arisen by reason of their negligence or any of their agents or servants and that in any event any claim founded

on such negligence is not maintainable by reason of the special contract between the parties.

4. The lower court has held, relying upon -- "Wills v. Great Western Rly. Co. (1914) 1 K. B. 263 that when consignment which was booked at

owner's risk arrived at its destination and some of the goods were found missing, and the plaintiff made a claim upon the defendant for the

nondelivery of a part of the goods, such non-delivery would not amount to "loss" within the meaning of the contract and that the plaintiff was

entitled to damages. Apparently the attention of the learned Judge was not invited to the fact that this decision is no longer good law in England,

because though this decision was confirmed by the Court of Appeal in -- "Wills v. Great Western Rly. (1915) 1 K. B. 199, when the matter was

taken up to the House of Lords, in their decision reported in -- "Great Western Rly. v. Wills", (1917) A. C. 148, the House of Lords reversed the

judgment under appeal before them and held that non-delivery of part of the consigned goods was loss within the meaning of the contract. We

have therefore to take it that the non-delivery in this case would amount to loss.

5. Our attention has been invited to a few cases under the Indian Railways Act, viz, -- "East Indian Rly. Co. v. Jogpat Singh", 51 Cal 615 --"M.

and S.M.Rly. Co. Ltd. v. Subbarao 43 Mad 617 and -- "Sheo Dayal Niranjana Lal v. G. I. P. Rly. Co. 49 All 236, for the interpretation of the

term "loss" in risk notes, and the opinion expressed therein is that the railway company is liable if the goods are lost in transit involuntarily or

through inadvertences and that the word "loss" does not mean pecuniary or other loss suffered by the owner of the goods through being wrong-

fully deprived of the possession, use, or enjoyment thereof, but means loss of the goods while in transit, and such loss occurs whenever the railway

company to which the goods have been consigned for conveyance involuntarily or through inadvertence loses possession of the goods. This argu-

ment was intended to show that the non-delivery was loss. There is no reason why the same interpretation should not be used when the carriage of

goods is by sea.

6. The argument advanced on behalf of the plaintiff is that since the defendants have not shown that the common carrier, or their agents, or servants

were not guilty of any negligence, it should be presumed that the non-delivery of part of the goods must make them liable for damages.

7. What we have to decide is whether the dispute in the present case is governed by the statutory law in India or by the English Common Law, and

if it is the English Common Law, what exactly is the nature of that law in regard to contracts of kind. The defendants have disclaimed their liability

on account of the special contract as alleged by them in paragraphs 4 and 4 (a) of their written statement. The Carriers' Act, 1865, (Act III of

1865) was the first statutory enactment in India by which common carriers are enabled to limit their liability for loss, or of damage to, property

delivered to them to be carried. But in this Act "common carrier" is defined as a person other than the Government, engaged in the business of

transporting for hire property from place to place, by land or in land navigation for all persons indiscriminately. Therefore, in view of the fact that

carriage in the present case was on the high seas, Act III of 1865 will not apply. The other statute relating to common carriers is the Indian

Carriage of Goods by Sea Act, 1925 (Act XXVI of 1925) enacted on the lines of the English Act of 1924, 14 and 15 George V, Ch. 22 a

comparison of the two statutes shows that they are practically identical. The English Act contains six sections whereas the Indian Act contains one

more, viz., Section 7 which speaks of saving and operation. With regard to the schedules and rules, the two enactments are in pari materia Article

1, sub-clause (c) of the schedule of both the Acts defines ""Goods"" as follows:

Goods include goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of the carriage is stated as being carried on deck and is so carried.

The appellants contend that the bags of beedi leaves in question being carried on deck at shippers' risk, are exempt from the carriage of goods by

Sea Act on account of the definition of ""goods"" contained in Art. 1, sub-clause (c) and that on account of the special exemption clause in the bill of

lading they are exempt from the liability for the loss or damages arising out of any cause whatsoever. It is further contended that this provision has

been held to limit the liability for loss arising out of their own, or their servants' negligence as well. In short, the argument on behalf of the appellants

is that since the Carriage of Goods by Sea Act does not apply the only law governing the parties in a matter like this is the English Common law

and under the English Common law, according to precedents and decided cases as well as text book writers it is open to the carrier to contract

himself out of the liability by special provisions as has been done in the bill of lading, Ex. A. 29. He further contends that the parties have agreed

with regard to the law applicable as found in clause 16 of the Bill of lading, which is to the following effect:

Law applicable. The contract evidenced by the Bill of lading shall be governed by the Laws of England and in accepting this bill of lading the

shippers and consignees expressly accept and agree to all its stipulations, exceptions and conditions whether written, stamped or printed as fully as

if signed by him or them.

We have to find out how far this contention is justified.

8. But the respondent's learned counsel maintains that even in the case of deck cargo the rule relating to Carriage of Goods by Sea Act. applies.

He invites our attention to the fact that the word ""goods"" has not been defined among the sections of the Act but only in the rules under the schedule

and that Article - VI of the rules should apply. If that is so, any contract like the one in Question, totally exempting the common carrier from liability

is opposed to the special conditions postulated in Art. VI and in any event Section 23 of the Contract Act applies to this case as the contract in

question is opposed to public policy. Total extinguishment of liability due to any

cause whatsoever should not be condoned as it is a matter which is opposed to public policy. It is argued that the meaning of the word ""goods"" though it is narrower in the schedule and rules, is much wider so far as the Act is concerned.

9. That prior to the passing of the Carriage of Goods by Sea Act in 1920, the common law of England was applicable to common carriers and not

the provisions of the Indian Contract Act relating to bailments is clear from previous decisions of this court as well as other High courts. In the --

"Irawaddy Flotilla Co. v. Bugwandas", 18 Cal 620 their Lordships of the Privy Council observe as follows:

Notwithstanding the able arguments of the learned counsel for the appellants, it seems to their Lordships that there are several considerations, not

all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872 was not intended to alter the

law applicable to common carriers.

10. Again at page 631 their Lordships observed:

These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers

and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act.

11. The provisions of the Indian Contract Act referred to above are Sections 151 and 152, the former of which makes it obligatory that the bailee

is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own

goods of the same bulk, quality and value as the goods bailed, and Section 152 absolves the bailee, in the absence of any special contract, from

any responsibility for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151. The

effect of these two sections is that if the bailee takes reasonable care of the goods, then he will be absolved from liability for the loss or destruction

of the goods taut he is bound to take reasonable care of the goods bailed as his own goods. According to their Lordships" decision in - "The

Irrawaddy Plottila Co. v. Bugwandas 18 Cal 620 these sections would not apply to common carriers so far as India is concerned. There are

passages in this judgment which makes it applicable to carriages on the high

seas also.

12. In -- "Sheik Mahamad Ravuther v. The British India Steam Navigation Co Ltd. 32 Mad 95, two of the learned Judges who constituted the

Bench of three, were of opinion that it is the English Common Law that applied and not the Indian Contract Act. But the third judge, San-karan

Nair J. took a different view, though on the facts of the case he agreed with White C. J. Both White C. J. and Sankaran Nair J. held on the

construction of the Bill of Lading, that the liability of the common carrier at that stage was specially provided for by a clause and they could not

invoke in aid the general negligence clause in the body of the document and that they were not exempted from liability for negligence. But Wallis J.

took a different view. Sankaran Nair J. held that the rule of English law, when allows ship owners to exempt themselves, by express contract, from

liability for negligence cannot be applied in India, as it is inconsistent with the provisions of the Indian Contract Act and the manifest intention of the

Legislature in enacting such provisions. Then the learned Judge referred to Sections 34 a and 101 of the Contract Act. He was further of opinion

that a contract limiting such liability will be opposed to the public policy and void u/s 23 of the Contract Act, as it will be against the interests of the

mercantile community and not necessary in the interests of the ship-owners. Though there may be something to be said in favour of the view taken

by Sankaran Nair J. still we feel that we are bound by the consensus of authority in this court as well as other High Courts. In -- The Bombay

Steam Navigation Co. Ltd. Vs. Vasudev Baburao Kamat, and -- Haji Shakoor Gany Firm v. Firm of Vol-kart Bros A. I. R 1931 Sind 124 the

view taken is that the English Common law is applicable. It has to be remembered that both these decisions are after the passing of the Carriage of

Goods by Sea Act.

13. In "Kariandan Kumbhar v. The British India Steam Navigation Co 38 Mad 941, Sadasiva Aiyar and Tyabji JJ. considered this aspect of the

issue at great length and came to the conclusion that the English law is applicable. At page 945, Sadasiva Aiyar J. observes thus:

As I am myself always inclined not to travel beyond Indian cases and Indian Statutes unless I am convinced that they are clearly not applicable, I

would have gladly referred the questions of the applicability of the Contract Act,

where it differs from the English Common law to a Full Bench, if I did not feel that I am concluded by the pronouncement of the Privy Council on this question. In the - "Irrawaddy Flottilla Co v. Bugwandas 18 Cal 620, their Lordships have clearly approved of the decision of the Full Bench in -- Moothorakant Shaw v. The Indian General Steam Navigation Co 10 Cal 168 and disapproved of the contrary decision in -- "Kuverji Tulsidas v. The G. I. P. Rly. Co 3 Bom 109. The effect of their Lordships' decision in the - "Irrawaddy Flottilla Co v. Bugwandas", 18 Cal 620 seems to me to be that the duties and liabilities of a common carrier are governed in India by the principles of the English common law on that subject" (except where they have been departed from in the case of some classes of common carriers by the Carriers Act Of 1855 or by the Railway Acts of 1878 and 1890) and "that notwithstanding some general expressions in the chapter on Bailments, a common carrier's responsibility is not within the Indian Contract Act of 1872".

Tyabji J. also says the same thing at page 953:

..... It is not open to this court to say that the liability of such carriers as we have to deal with in this case is governed by Section 151 of the Indian Contract Act, after the decision of the Privy Council in the case of the - "Irrawaddy Flottilla Co v. Bugwandas", 18 Cal 620. In that case, the Privy Council had to decide whether the view of the Bombay High Court as expressed in - "Kuverji Tulsidas v. Great Indian Peninsular Railway Co 3 Bom 109 was correct or the view of the Calcutta High Court in - "Moo-thara Kant Shaw v. The Indian General Steam Navigation Co", 10 Cal 166 and they said that they were compelled to decide in favour of the view of the Calcutta High Court and against that of the High Court of Bombay. In deciding against the view of the High Court of Bombay, they decided against the argument on which the appellant relied. They decided that the liability of carriers such as we have to deal with is not governed by the sections of the Indian Contract Act, relating to bailees".

½We may also refer in this connection to a recent decision of the Travancore Cochin High Court in - "Orient Ship Supply Co Ltd. v.

Kaiamarsand Co 5 D. L. R.346 where the learned Judges discussed the various cases on the topic. Therefore it can be taken as settled that prior

to the enactment of the Carriage of Goods by Sea Act. in 1925, the Common law

of England was the Jaw applicable so far as India was concerned. Does it make any difference to the law applicable after the passing of that Act? This Act was passed as a result of the International Conference on Maritime Law held at Brussels in October 1922, by which certain unanimous recommendations were made to the various Governments that took part in the conference to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading and in pursuance to that, as we stated, in England the Carriage of Goods by Sea Act of 1924, 14 and 15 George v, Chapter 22 was passed which is practically "ad idem" to the Indian Act.

14. We have rejected the argument of the learned Counsel for the respondents that Art. VI in the schedule to Act XXVI of 1925 will be

applicable to deck cargo. But still he argues relying upon certain observations of Sankaran Nair J. at page 126 of - "Sheik Mahamad Bavuther v.

The British India Steam Navigation Co, Ltd, 32 Mad. 95 that the principles of the Contract Act should be applied to a case like this. This

argument has not found favour even at a time when the Carriage of Goods by Sea Act was not in existence. See - "Moothura Kant Shaw v. The

Indian General Steam Navigation Co", 10 Cal 166 and - "British and Foreign Marine Insurance Co Ltd. v. Indian General Navigation and Ply.

Co, Ltd. 38 Cal 28. If until the passing of the Carriage of Goods by Sea Act, the law relating to the carriage of goods by sea was governed by the

Indian Contract Act, then there would have been some mention made of it at the time of the passing of the Carriage of Goods by Sea Act. The

absence of any reference is an indication that there was no such thing.

15. At page 475 of Carver's Carriage of Goods by Sea, 8th Edn. (1938) specific reference has been made to the fact that the English Carriage of

Goods by Sea Act of 1924 does not apply to cargo which by contract of carriage is stated as being carried on deck and is so carried. (Schedule

of rules, Art. I (c) such being the case if in England the Act would not apply to carriage of goods by sea, we fail to see why in India also, after the

passing of an identical statute its provisions should apply to carriage of goods by sea. We therefore have no doubt in holding that so far as the

goods in question are concerned, the Act of 1925 would not apply. We are also of opinion that if the English Common Law applied then Sections

151 and 152 of the Indian Contract Act cannot affect the liability of the common carrier.

16. Now the important question arises as to whether the exemption clause which makes the carrier immune from all liability whatever for the goods

or for any loss can be pleaded by the defendants in the present case where there is nothing to show how the bags of beedi leaves came to be short

delivered. In other words the question is whether such a clause is valid or not. Before we discuss that question we may advert to the fact that the

bill of lading, though expressly mentioned to be under the Indian Carriage of Goods by Sea Act and the schedule thereto, has this fact that the

paramount clause relating to the application of that Act has been cancelled before the same was issued. That the liability for (of?) a common carrier

for the loss, injury or delay in respect of the goods carried may be varied by contract is evident from the statement of the law in Halsbury's Laws

of England, volume IV, page 27, Art. 37. Carver, even at the very outset at page 2 of his book states the following passage in dealing with such

liabilities:

Therefore it should be borne in mind that the degree of the responsibility which a ship owner impliedly undertakes, as described in this chapter,

while remaining the fundamental basis which an express contract may modify is not in most cases the fundamental basis when the express contract

is evidenced by a bill of lading".

At page 118 in Art. 77, of the same book it is stated that exceptions in the bill of lading should be construed against the ship owner when they are

ambiguous and a passage from the judgment of Lord Loreburn L. O. in -- "Nelson Line v. James Nelson & Sons Ltd., (1908) A. C. 16 is

quoted. If there is a general clause in a bill of lading by which the ship owner is exempted from Liability for damage to goods whether arising from

a defect existing at the time of the shipment or not, or from neglect of the master or crew, or from any other cause whatsoever, and that general

clause is qualified by a second clause which exempted the ship owner from liability for damages from defects if reasonable means have been taken

to provide against such defects and unseaworthiness, it was held by the House of Lords in -- "Elderslie Steamship Co. v. Borthwick, No. 1 (1905)

A. C. 93 that the subsequent clause must prevail over the earlier clause. That is,

their Lordships are of opinion that though it is open to a shipowner to exempt himself from liability by contracting that he would not be liable for any loss whatever even arising out of negligence, if another clause restricts exemption from liability only if reasonable means have been taken to provide against defects and unseaworthiness, the subsequent clause would prevail. At page 96, Earl of Halsbury J. lays down the law thus:

It seems to me that if what has been called the large print had stood alone I should not have had the smallest doubt that it would have carried the shipowner the whole way; I can give no other construction to it than that which the words express; but the difficulty in his way is that he has thought proper to execute an instrument which has two different sets of phrases in it, and one rule of construction which must prevail is that you must give effect to every part of a document if you can -- you must read as a whole. Mr. Carver has ingeniously spoken of independent contracts and independent paragraphs and so on, but we must remember that this one contract, and each of the parts of this contract must be read so as to give effect to the whole if it can.

My Lords, the only mode of so reading it is to read the first part of it thus: "I am not to be liable for this", and then what comes after it by way of exception, "I shall not be liable unless I have failed to take all reasonable means against the injury" that has happened. In that way you can read the two together, and this seems to me to be the only way in which you can make a reasonable and intelligible contract, and give effect to the words which the parties have agreed to.

Their Lordships are quite positive that if the large print clause, as they call it, which exempts the carriers from liability for all losses including non-delivery had stood alone, such a contract would be valid and binding. "

17. In the case reported in *Chartered Bank of India, Australia and China v. British India Steam Navigation Co, Ltd.* (1909) A.C. 369, there was a

clause in the bill of lading that "the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the

goods shall be at the risk for all purposes and in every respect of the shipper or consignee". What happened was that the goods were delivered to

landing agents appointed by the company itself, but by the fraud of the landing agents, the goods never reached the consignees. Even in such a

case it was held by their Lordships that although there had been no delivery under the bills of lading, yet the provision as to cessor of company"s

(defendants) liability directly the goods were free of the ship"s tackle was perfectly clear, and that that was sufficient and effective to protect them.

18. The rule of exception has been adopted in India almost uniformly as is seen from decisions of other High Courts, such as the one reported in

"B. I. S. No. Co, Ltd. v. Alibhai Mahomed", 62 Ind Cas 378 (Low. Bur) (F.B.)

19. Learned counsel for the appellants referred us to two other cases, viz., -- "Lewis v. Great Western Rly. Co", (1678)3 Q.B.D 195 and --

"Price and Co. v. Union Lighterage Co", (1904) 1 K. B. 412. On a perusal of these cases it seems to us that the principles enunciated therein

cannot with any advantage be applied to the facts of the present case.

20. In discussing as to the law applicable we had to refer to the decision in - "Jellicoe v. The British Steam Navigation Co.", 10 Cal 489. But that

Judgment is further instructive in the application of the doctrine of the exemption of liability. That case arose out of a reference by a Judge of the

Small Cause Court and the learned Judges of the Calcutta High Court, on the reference held that since the plaintiffs had accepted the terms of the

bill of lading which contained a clause,

carried and delivered subject to the conditions after mentioned loss or damage for any act, neglect or default whatsoever of the pilot, master

or mariners or other servants of the company, excepted

they cannot make the common carrier liable for the loss of the goods. In that case, the goods were destroyed owing to the carelessness of the

common carrier"s servants and when the plaintiffs sued the company for damages it was held by the Calcutta High Court that the company were

protected by their bill of lading the terms of which had been accepted by the plaintiffs. The terms were similar to the one which we have to

consider now.

21. In -- "Hajee Ismail Salt v. The Co. of the Messageries Maritimes of France", 28 Mad 400 this court has held that since carriers by sea for hire

prior to the passing of the Carriage of Goods by Sea Act, are common law of England, under the English Common law, a common carrier may

protect himself from liability for deliberate acts of misfeasance on the part of himself or his servants for losses arising even by acts or negligence. It

is worthwhile to Quote a passaga from the judgment at page 403.

By the English law applicable to common carriers, the common carrier may enter into any contract so as to protect himself, but he can only do so

by clear, definite, and unambiguous words; If therefore the words used in the exemption clause of the bill of lading are clear, definite and

unambiguous, they may suffice to protect the shipowner even from deliberate acts of misfeasance on the part of himself or his servants. On arrival

at Madras the defendants delivered the plaintiff's goods, which were oats, in heavy rain and allowed them to get wet in the process. They might, if

they had chosen to do so have taken the goods on and not delivered them until later when it was fine; and the plaintiff contends that their act in

delivering the goods in rain instead of delaying the delivery until it was fine, was an act of deliberate misfeasance and not mere negligence as the

learned Chief Judge has found in the case stated. We think the acts of the defendant's servants amounted only to negligence and that the learned

Chief Judge is right in so holding. We further think that the words of the clause above quoted are sufficiently clear and definite to protect the

defendants and we answer the question referred to us in the negative.

22. In -- "Sheik Mahmad Ravuther V. British India Steam Navigation Co. Ltd.", 32 Mad 95 ; -- Kariandan Kumber v. The British India Steam

Navigation Co. 38 Mad 941 there were similar clauses in the bills of lading and in the latter case this court was of opinion that such a clause

relieved the common carrier of any responsibility. Such a clause, according to English law is not opposed to public policy and is valid and Section

23 of the Indian Contract Act has no application. We may say in this connection that the. decision in -- "Kariandan Kumber v. The British India

Steam Navigation Co.", 38 Mad 941 is applicable directly to the facts of the present case.

23. A further argument was put forward based on the words in the exemption clause in the bill of lading, viz., ""however caused and whether due to

negligence, unseaworthiness, or otherwise,"" in this clause should be read as ejusdem generis but that argument has been repelled in -- "Baerselman

v. Bailey", (1895) 2 Q. B. 301 where it has been laid down that these words should have full import and cannot be construed as ejusdem generis.

24. In order to establish that the extinguishment of liability for any reason

whatever cannot be had by means of a contract like the one in question, learned advocate for the respondents brought to our notice a decision in the Stranne, (1937) P. 130". In that case Langton J. considered the effect of the expression "'at charterer's risk'" in the bill of lading and was of opinion that the words did not put on the owner of the goods the risk of loss in every case in which the cause of the loss was unknown and since the defendants the shipowners in that case, had failed to provide an explanation in any sense comparable in probability with the probability of their own negligence, in the loading, the defence failed. A perusal of this case leaves one with the impression that according to the learned Judge it is necessary that the carrier must show that there was no negligence in the case of deck cargo. At page 148, he observes as follows:

Applying this line of thought to the present case I am at once confronted by the difficulty that the explanation given by the shipowners is exceedingly meagre. Their theory of cross currents is quite untenable, and their evidence at the best leaves the cause of the heeling completely unexplained. Mr. Willink urges that, although the words deck cargo "'At charterer's risk'" do not excuse the shipowners for negligence proved and determined, they will avail to put upon the goods owner the risk of loss through unascertained causes. As to this I feel that the statement is too wide. I can quite easily read the words "'at charterer's risk'" to mean that the goods owner takes the chance of some imperfectly ascertained cause of action. But to say that it confers on the shipowners a right to claim exemption from liability in every case in which the cause of the loss is unknown seems to me to be altogether too benevolent a construction in favour of the party who has inserted the exception. Pushed to its logical conclusion this argument would appear to go to the length of saying that these words excuse a bailee from giving any explanation of the loss of goods entrusted to him. Indeed he might well deem it wiser not to attempt an explanation since without one he must succeed".

He also referred to an earlier decision in - "Svenssons Travaruktiebolag v. Cliffe Steamship Co.", (1932) 1 K.B. 490 where Wright J. as he then was in considering the question of the carrier's liability in carrying goods under a contract of affreightment which contained a similar exception clause held that although the words in the charterparty "'at charterer's risk'"

standing alone did not excuse the defendants in the case of a loss due to negligence on their part or on the part of their servants, those words must be read with the exception clause, and the effect of reading the two together was to enable the carriers to rely on the exception clause, which protected them against the consequences of such negligence. The exception clause was to effect that the carrier will not be liable even when the loss is occasioned by the negligence, default or error in judgment of the master mariners, or other persons employed, by the shipowner or for whose acts he is responsible. All that is required in such cases for the shipowner to prove is that the ship was seaworthy and nothing more. It is argued by the learned counsel that the present case resembles the case in the *Stranna*, (1937)P. 130 where the shipowners did not let in any evidence as to how the loss occurred. It has to be noticed that the observations of Langton J. are somewhat wide and were, as the learned Judge says unnecessary for the decision of the case, because he premises the discussion by stating that since the case might go higher and that he may be proved to be wrong in this determination of the first point, he thought, it desirable to express his view as to this point. It seems to us that if the shipowner on this contract of affreightment is not liable even if the acts of negligence are on the part of the master mariner and other persons employed by the shipowner, it is not obligatory for him to show that there was negligence when a loss has occurred. It might be that the loss was due not because of any negligence at all but due to some unforeseen acts. In such a case, he is no doubt protected. Therefore the reasoning of Langton J. that if the bailee deemed it wiser not to attempt an explanation he is in a better position than if he had attempted an explanation is in our opinion somewhat overstrained; One can conceive of circumstances where a party can rely on strict legal technicality without attempting to put forward any definite case. What prevents a party from saying that if the words of a contract are to be construed in his favour he can keep silent and need not try to put forward any explanation? In our opinion the bill of lading in this case relieves the shipowner from any liability with regard to showing how the loss had occurred.

25. Reference was also made to passages in Story on the Law of Bailments, 7th Edn. page 433 as well as Carver's Carriage of Goods by Sea,

3th Edn. pages 167 and 168, Section 103 onwards Section 490 in Story on the Law of Bailments is as follows: ""The reason assigned by Lord

Holt for this doctrine is as follows:

The law", says he "charges this person (the carrier) thus intrusted to carry goods against all events but acts of God and of the enemies of the king.

For, though the forces be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a political

establishment contrived by the policy of the law for the safety of all persons, the necessity of persons, that they may be safe in their dealings. For

else these carriers might have an opportunity of undoing all persons, that had any dealings with them, by combining with thieves &c. and yet doing

it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point." The

ground of the resolution is (As Sir William Jones has justly observed) not the reward of the carrier (upon which Sir Edward Coke lays much stress

but the public employment exercised by the carrier, and the danger of his combining with robbers to the infinite injury of commerce and extreme

inconvenience to society. He is treated as an insurer against all but the excepted perils, upon that distrust, which an ancient writer has called the

sinew of wisdom. In truth, the reason or policy of the rule is borrowed from the Roman law, where (as we have already seen), the rule is applied

equally to carriers by water to innkeepers, and to stable keepers; but it is applied with a stricter severity in the common law, that it was in that law.

It has to be remembered that the American law with respect to the liability of the carrier is different from the English law though subsequently even

in America the law has been changed as is seen in note (II) at page no of Carver's Carriage of Goods by Sea. The note is to the effect that the

Carriage of Goods by sea Act took effect in the United States on July 15, 1936, its provisions corresponding to those of the English Act of the

same name. We may also in this connection refer to Outline of the Law relating to Bills of Lading by C. H. Main Thompson, M. A. at pages 170

and 171 to the following effect:

The shipowner may escape liability or such loss by an express exception such as "goods carried on deck are solely at merchant's risk". He may

avail himself of this exception (1) in a contract of carriage to which the rules are

not in any case applicable; and (2) in a contract of carriage to which, but for the provisions in the rules as to deck cargoes the rules would be applicable, by complying with those provisions, that is, by stating in the contract of carriage that the cargo is being carried on deck, and so carrying it. The shipowner apparently, cannot escape liability for loss of or damage, to a deck cargo which is being carried under a contract of carriage to which, but for the provisions in the rules as to deck cargoes, the rules would be applicable if he fails to comply with those provisions. He cannot under the rules lessen his liability otherwise than is provided in the rules and any agreement designed to have that effect is null and void and of no effect.

For substantiating the idea underlying the last sentence, the footnote gives reference to the Carriage of Goods by Sea Act, 1924, Art III, rule 8 and therefore we are of opinion that it cannot apply to deck cargoes as was sought to be contended by Mr. T. R. Arunachalam for the respondents.

26. Learned Counsel for the respondents strenuously urged before us that in none of the cases cited except probably the *Stranna* (1937) P. 130 in which observations are in his favour, is the total extinguishment of liability provided even where no explanation is given as to how the loss occurred.

As we have already remarked if after proving negligence, the carrier can escape liability under the agreement, there is no reason why he should be mulcted with liability when the loss may be due to negligence or for other reasons. The carrier's silence and failing to prove negligence might be construed in favour of the consignor as an implicit admission of negligence. Viewed in that way also the exception clause can be called in aid in support of the carrier's extinguishment of liability. In the case before us the exemption clause is clear that if the loss or non-delivery has occurred as a result of negligence unseaworthiness or otherwise, they will not be liable and we are of opinion that the case comes within the principles enunciated in the various decisions to which we have already referred. In this view, it seems to us the appellants are not liable for the non-delivery of the 44 bags of beedi leaves. The appeal therefore is allowed the suit dismissed with costs throughout.