

**(1915) 10 BOM CK 0010**  
**In the Bombay High Court**

C. Boggiano and Co.

APPELLANT

Vs

The Arab Steamers Ltd.

RESPONDENT

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**Date of Decision :** 21-10-1915

**Acts Referred:**

Contract Act, 1872 — Section 65

**Citation :** 33 Ind. Cas. 536

**Hon'ble Judges :** Macleod, J

**Bench :** Single Bench

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## Judgement

Macleod, J.—The defendant Steamer Company entered into an agreement, on the 1st April 1915, with the firm of Chhagandas and Company whereby the latter chartered the steamer "Hejaz" for a voyage, Bombay to Naples, Genoa and or Marseilles, any two discharging ports at charterer's option. On the 14th April, the "Jeddah" was substituted for the "Hejaz." The plaintiffs procured from Chhagandas and Company freight for 2,500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants. The 2,500 bales were put on board the "Jeddah" and twenty-five bills of lading relating to them were issued by the defendants, who were paid Rs. 32,610-6-2 for freight. Owing, however, to the import of cotton into Genoa being prohibited by orders of Government, the "Jeddah" did not leave the harbour and the voyage had to be abandoned. Negotiations were entered into with the various shippers of cotton, which are set out in the correspondence annexed to the pleadings, but eventually the Jeddah unloaded her cargo in the Alexandra Dock. Before getting delivery of their cotton the plaintiffs were asked to deposit Rs. 12,000 to cover the expenses and loss incurred by the ship and this sum was paid. The plaintiffs, thereupon, demanded the return of the amount paid by them for freight, but the defendants claimed that under the events which had happened they were entitled to retain the money and especially relied upon the second slip attached to the shipping orders. The plaintiffs, therefore, filed this suit to recover the freight and for an account of the Rs. 12,000 paid by them to defray the costs of unloading. If the Indian Contract Act applies, the contract became void u/s 56 of

the Act and the defendants were bound, u/s 65, to restore to the plaintiffs the advantage they had received under the contract.

2. But it has been contended, first, that money paid in advance for freight is irrecoverable at law; secondly, that the defendants are common carriers and that under the decision of the Privy Council in the case of *Irrawaddy Flotilla Company v. Bugwandas* 18 C. 620 : 18 I.A. 121 : 6 Sar. P.C.J. 40 the rights and liabilities of common carriers are outside the Indian Contract Act and are governed by the principles of English Law as modified by the Common Carriers Act of 1865.

3. By the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to a charter-party to covenant by express stipulation in such manner as to control the general operations of law: per Lord Ellenborough, C.J., in *De Silvale v. Kendall* 1815 4 M & S 37 : 16 R.R. 373 : 105 E.R. 749.

4. Now the defendants, for their first proposition, relied on the case of *Kirchner v. Venus* (1850) 12 M.P.C. 361 : 5 Jur. (N.S.) 395 : 7 W.B. 455 : 14 E.R. 948 : 124 R.R. 95 where it was held that freight paid in advance lost its legal character of freight and was money paid to the shipowners for taking the goods on board and undertaking to carry them to their destination, while freight in law was money paid for the carriage of the goods and was payable on the arrival of the goods at their destination though it might, under the terms of the contract, be payable at the port of departure. But the question in that case was whether the shipowner had a lien for freight on goods shipped from Liverpool to Sydney when, under the terms of the charter, the freight was to be paid in Liverpool one month after the date of sailing and, as a matter of fact, had not been so paid before the ship arrived at Sydney, and it was decided that as the money so to be paid was not freight in law, the shipowner had no lien on the goods. I doubt whether in these days such a contract for the carriage of goods would be likely to be made in India; either the freight is paid before the goods are shipped in which case the shipper would insure the freight, or the freight is payable on arrival in which case the shipowners would insure; though if it is a term of the contract that freight is payable, ship lost or not lost, the shipper would have to insure in any case.

5. But freight to be paid in advance is not irrecoverable because it loses its legal character of freight, but because by the Common Law of England the general rule is that when a contract becomes impossible of performance by the failure of a state of things contemplated as the foundation of the contract to exist, the partners are excused from further performance and acquire no rights of action so that each must bear any loss or expense already incurred, and cannot recover back any payment in advance: *Civil Service Co-operative Society v. General Steam Navigation Company* (1903) 2 K.B. 756 : 72 L.J.K.B. 933 : 89 L.T. 429 : 52 W.R. 181 : 9 Asp. M.C. 477 : 20 T.L.R. 10.

6. Reading the charter-party, the shipping orders and the bills of lading together, I think that the money paid by the plaintiffs was freight paid in advance under

the terms of the contract and was not merely money payable in Bombay on the completion of the voyage, which was paid prematurely at the will of the plaintiffs, as was the money paid for freight in the case of *Krall v. Burnett* 25 W.R. 305. It is admitted that under the Common Law of England the plaintiffs would not be able to recover because the contract became impossible of performance and it is argued that the Common Law of England applies because the defendants are common carriers. The following definition of a common carrier by Parsons was approved by Cockburn, C.J., in the case of *Nugent v. Smith* (1876) 1 C.P.D. 423 : 45 L.J.P.C. 697 : 34 L.T. 827 : 25 W.R. 117:

A common carrier is one who offers to carry goods for any person between certain termini and on a certain route. He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage.

7. A common carrier is also entitled, when goods are offered to him, to demand and to be paid the full price of carriage, and if this is not paid he may lawfully refuse to carry at all. But the price demanded must be a reasonable one. It is also essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him.

8. Now the preamble to Act III of 1865 states: Whereas it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents;" and u/s 2: Common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately," thus excluding carriers by sea. Therefore, carriers by sea in India are not entitled to the benefits of Act III of 1865, though it may be a question whether the Common Law of England is not still applicable to them.

9. In the case of *British India Steam Navigation Co. Ltd. v. Hajee Mahomed Esack and Company* 3 M. 107 the Court seems to have assumed it without further consideration, but considering the terms of the preamble I should feel inclined to doubt it. The law relating to the liability of common carriers was first established by our Courts with reference to carriers by land. In the case of *Rich v. Kneeland* (1614) 2 CJ 330 : Hob. 17 : 79 E.R. 282 it was decided that the common wayman or carrier by water stood on the same footing as common carrier by land. The first case in which the liability of the owner of a seagoing ship comes in question was *Morse v. Slue* (1872) 1 Vent. 190 : 3 Keb. 72 , T. Ryam. 220 : 1 Mod. 85 : 84 E.R. 601 : 86 E.R. 129; see per Cockburn, C.J., in the case of *Nugent v. Smith* (1876) 1 C.P.D. 423 : 45 L.J.P.C. 697 : 34 L.T. 827 : 25 W.R. 117. Now it is interesting to note that in that case it was argued in the lower Court; though without success, that the liability of the defendant Company, which agreed to carry the plaintiff's mare by steamer from London to Aberdeen,

could not be made to rest on the allegation that they were common carriers, because it was said that liability was imposed by the custom of the realm and such a custom could not have force beyond the realm.

10. It may be that the owners of coasting steamers should be considered on the same footing as carriers by inland navigation, but it would be difficult for any owners of seagoing steamers to come within the definition of common carriers" though of course it is not impossible, and as the Indian Legislature designedly excluded common carriers by sea from the benefits of Act III of 1865, they may have intended to bring their liability under the Common Law of bailment.

11. But even supposing the defendants" Company run general ships as common carriers, the next question is whether in this particular case when they chartered the whole ship to Chhagandas & Co. they can be treated as common carriers. The whole question was very fully discussed in the case of *Nugent v. Smith* (1876) 1 C.P.D. 423 : 45 L.J.P.C. 697 : 34 L.T. 827 : 25 W.R. 117, above-cited, by Cockburn, C.J., (though it was not necessary for the decision of the case) in order to meet the opinion expressed by Brett, J., in the lower Court that by the Law of England all carriers by sea were subject to the liability which by that law undoubtedly attached to common carriers whether by sea or land:

All Jurists who treat of this form of bailment carefully distinguish between the common carrier and the private ship.... But if the owner of a ship employs it on his account generally...he will not be deemed a common carrier, but a mere private carrier (*Story on Bailment*, Section 501).... But the learned author does not say what would be the case where a shipowner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, on a private bargain, and not as a general ship....

I cannot help seeing the difficulty which stands in the way of the ruling in the case of *Liver Alkali Co. v. Johnson* (1874) L.R. 9 Ex. 338 : 43 L.J. Ex. 216 : 31 L.T. 95 : 2 Asp. M.C. 332, that it is essential to the character of a common carrier that he is bound to, carry the goods of all persons applying to him, while it never has been held, and as it seems to me could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it.....

The importance of the question is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charter-party or bill of lading.

12. Therefore, it is not sufficient to say that because the defendants" Company own steamers and carry goods by sea they are common carriers. For all I know they may own general ships though there is no evidence that they run any ships on a particular line between certain termini on which they are bound to carry goods for the public on receipt of reasonable charges. Even if they did that would not make them common carriers as regards ships let out on charter. In this case the whole ship had been chartered by Chhagandas & Co., who brought the

persons to whom they sold cargo space into contractual relationship with the defendants. Therefore the ship was not a general ship the owners of which were bound to carry goods for any of the public who might wish to despatch their goods in the ships.

13. The last question is whether, even supposing the defendants are common carriers, the provisions of the contract applicable to all contracts in general are not applicable to the contract in this case. In the case of *Irrawaddy Flotilla Company v. Bugwandas* 18 C. 620 ; 18 I.A. 121 : 6 Sar. P.C.J. 40 the only question was whether the chapter of the Act relating to bailments applied. Their Lordships were only dealing with the liability of common carriers, and the Common Law of England relating to common carriers only differs from the Common Law of contract in respect of their liability as bailees. They held that as Act III of 1865. which codified only a part of the Common Law relating to the liability of common carriers, was not repealed by the Indian Contract Act, it was intended to leave the law in India relating to the liability of common carriers as it was, that is to say, partly governed by the Common Law and partly by Act III of 1865 and not to substitute for that part of the Common Law which was not included in Act III of 1865 the provisions of the Act.

14. I do not think that, when their Lordships said that there was in India before the Indian Contract Act a complete code for common carriers, they intended to decide that the general provisions of the Common Law relating to the formation and performance of contracts should still be applicable to contracts entered into by the public with common carriers.

15. The defendants appear to have conceded this before the hearing, as it is nowhere suggested in the correspondence before suit or in the pleadings that the defendants were common carriers. The plaintiffs were asked to admit that the ship was under charter to Chhagandas & Co. and in paragraph 5 of the written statement the defendants rely on Section 56 of the Indian Contract Act. The defence was really based on the decision in the case of *Civil Service Co-operative Society v. General Steam Navigation Company* (1903) 2 K.B. 756 : 72 L.J.K.B. 933 : 89 L.T. 429 : 52 W.R. 181 : 9 Asp. M.C. 477 : 20 T.L.R. 10 which is applicable to all contracts and not only to contracts with common carriers.

16. The special provisions of the Common Law of common carriers dealt with their liability and nothing else, and formed a special chapter of the law of bailment. Therefore, in any event, in my opinion, the case is governed by Section 65 of the Indian Contract Act; and the plaintiffs are entitled, under the events which have happened, to recover the amount paid by them in advance for freight with interest at 6 per cent, from the 15th June 1915.

17. As regards the account rendered for expenses, the defendants have conceded that demurrage should only be charged for twenty-five days and the item for demurrage on waggons should be omitted.

18. The plaintiffs contest the item for insurance, on the ground that they were

not informed that the defendants were going to insure the goods and if they had been, they would have asked the defendants not to insure as their goods were covered by a general policy. It is interesting to contrast the defendants' anxiety to insure the goods with their present contention that they were common carriers. However, I must accept Mr. Wardlaw Milne's evidence that at a meeting with the shippers on the 20th May the, question of insuring the goods was discussed, so that plaintiffs must have had notice and could have told the defendants if they wished them not to insure their goods.

19. The charges for labour for removing the goods to Tank Bunder must stand, as the plaintiffs have not proved that the defendants could have obtained cheaper rates for the work to be done considering all the circumstances of the case and especially the time of year.

20. As the defendants have paid into Court more than sufficient to meet the balance for expenses that can be set off against the freight which is re-payable there will be a decree for plaintiffs for the amount of the freight paid with interest at 6 per cent, from 15th June 1915 till judgment with costs and interest on judgment at 6 per cent.