
(1970) 02 KL CK 0012
In the High Court Of Kerala
Case No : CRP No. 540 of 1969

C.D. Johar and Sons (P) Ltd.

APPELLANT

Vs

Messrs. Peirce Leslie and Co.

RESPONDENT

Date of Decision : 20-02-1970

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Section 6
Contract Act, 1872 — Section 151, 152, 161, 230
Major Port Trusts Act, 1963 — Section 42, 43, 48, 49, 50

Citation : (1970) KLJ 260

Hon'ble Judges : E.K. Moidu, J

Bench : Single Bench

Advocate : A.K. Ramaseshadrinathan, for the Appellant; K.V.R. Shenoi, for the Respondent

Final Decision : Allowed

Judgement

E.K. Moidu, J.—This revision petition by the plaintiffs in Small Cause suit No. 108/67 on the file of the court of the Additional Munsif, Cochin, is against the dismissal of the suit upon the following facts: The appellants, Johar & Sons (P) Ltd., Cochin, sued the defendant Pierce Leslie & Co., Ltd., as the Shipping Agents of The Clan Line Steamers Ltd., to recover a sum of Rs. 303.28 being the net value of 18 pieces of Drag Link Ends in short supply which arrived at Cochin Port on 4-3-63 by "S.S. Clan Maciver". The consignment was booked in good condition by the consignor, Quinton Hazell Ltd., Great Britain, on board the ship at Liverpool to be delivered over to the appellants on the terms and conditions of a Bill of Lading under an import licence. The defendant as the shipping agents of the carrier had to deliver the goods to the appellants' clearing agents, Chakiat Agencies, Cochin. But, no delivery was effected in respect of the above 18 pieces of Drag Link Ends, though other goods under the same consignment had been delivered to them. The delivery was an open delivery on 10th May, 1965 in the presence of the Chakiat Agencies and the defendants' employees. The result of the open delivery was the loss of 18 pieces of the above Motor spare parts of the

value of Rs. 303.28. There was some exchange of notices between the appellants and the defendants. But, the defendants denied their liability as well as the responsibility to make good the loss to the appellants. Hence the suit.

2. The defendants in their written statement contended that the court has no jurisdiction to entertain the suit, that the claim, if any, was barred by limitation as the same was not made within one year of the date of delivery, that the goods were in the charge and control of the Port Trust, Cochin, that the Port Trust alone was liable for the damages, if any, incurred by the appellants, that there had been no negligence or delay on the part of the defendants for the short delivery alleged and that, therefore, the suit as against them had to be dismissed with costs.

3. (sic) court framed, in all, 7 points for determination and recorded principle (sic) of them. The lower court found that there was short delivery to the extent of 18 pieces of Drag Link Ends out of the consignment in question, that the appellants would be entitled to get Rs. 303.28 towards the value of those missing pieces of Motor spare parts, that Port Trust is not liable for the claim, that the suit was not barred by limitation, that the appellants had no cause of action against the defendant to claim the amount independently from them as the agents of the Clan Line Steamers Ltd., that the suit against the defendants is not maintainable and, therefore, the suit was dismissed, however, without costs. The defendants were seen to have submitted to the jurisdiction of the lower court to decide the question in (sic) sue in the suit. So, it is stated as against point No. 3 that the contention whether the lower court had jurisdiction to entertain the suit was not pressed by the defendants.

4. The point that devolves to be decided is whether the defendant is liable in damages as the agents of the carrier The Clan Line Steamers Ltd., The appellants have chosen to lay the claim against the shipping agents of the Clan Line Steamers Ltd., who carried the goods in question in the ship "S.S. Clan Maciver" from Liverpool to the Cochin Port on the basis of Ex. D. 1, Bill of Lading. On the conditions and terms of Ex. D1, Bill of Lading, the carrier had to deliver the goods to the appellants or their agents. Open delivery in this case was made only on 10-5-65, though the goods arrived in the Port of Cochin on 4-3-65, There had been no evidence in the case that it was due to the neglect or indifference of the appellants that the goods were not taken delivery of by them or their agents soon after the goods arrived in the Port on 4-3-65. On behalf of the appellants, P.W. 1 is examined and P.W. 2 is the Manager of the Chakiat Agencies, who were the cleaving agents of the appellants. On the defendants" side, D.W. 1, an employee of the defendants had been examined and D.W.2 was the tallying clerk, who was also deputed at the instance of the defendants themselves. After the arrival of the ship, a tallying sheet, Ex. D2, was prepared on 8-3-65. Ex. D2 is alleged to be the sheet for import cargo on landing the goods arrived in the ship Clan Maciver of which the defendant was the agent. Ex. D2 was prepared by D.W. 2. The consignment in question was shown as the last but one item in Ex.

D2. Ex. D2 by itself is not evidence that the consignment was damaged or not. Both D. Ws 1 and 2 were the agents of the defendants and as such they were interested both in the defendants as well as their principals, the carriers in the instant case. It was the responsibility of the defendants as would be seen from the evidence to unload the cargo from the ship and to bring them to the yard of the Port after removing them from the tackle of the ship in which case the liability of the principal as well as their agents continued until actual delivery of the goods was given to the person who produced the Bill of Lading. As a matter of fact, the defendants could not give actual delivery of the entire goods. There was shortage of 18 pieces as alleged above. In the circumstances of the case, therefore, the appellants could not take delivery. There was no occasion for the appellants to have given a notice of loss or damage either to the defendants or to the principal. It is also clear that no such notice was necessary u/s 6 of the Indian Carriage of Goods by Sea Act, 1925 (Act XXVI of 1925) Section 6 reads as follows:--

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

5. There was admittedly an open delivery in the presence of the respective agents of the defendants and the appellants on 10-5-65. If that be so, the question for consideration is whether the Port Trust would be liable for the damage in question. The performance of service by the Port Trust or other person concerned is contained in Section 42 of the Major Port Trusts Act, 1963 (Act 38 of 1963). Section 42 reads as follows:

(1) A Board shall have power to undertake the following services:--

(a) lading, shipping or transshipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government may think fit to impose; and

(d) receiving and delivering/transporting and booking and dispatching goods originating in the vessels in the port and intended for carriage by the neighbouring railway; or vice versa, as a railway administration under the Indian

Railways Act, 1890.

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in This section, the Board may, with the previous sanction of the Central Government, authorise any person to perform any of the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

(4) No person authorised under sub-section (3) shall charge or recover for such service any sum in excess of the amount leviable according to the scale framed u/ s 48 or Section 49 or section 50.

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services, and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.

6. Closely allied to the provisions of the above section are the provisions of Section 43 of the same Act. Section 43 may also be quoted as follows:--

(1) Subject to the provisions of this Act, the responsibility of any Board for the loss, destruction or deterioration of goods of which it has taken charge shall,--

(i) in the case of goods received for carriage by railway, be governed by the provisions of the Indian Railways Act, 1890; and

(ii) in other cases, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872, omitting the words "in the absence of any special contract" in section 152 of that Act;

Provided that no responsibility under this section shall attach to the Board until a receipt mentioned in sub-section (2) of section 42 is given by the Board.

(2) A Board shall not be in any way responsible for the loss, destruction or deterioration of, or damage to, goods of which it has taken charge, unless notice of such loss or damage has been given within such period as may be prescribed by regulations made in this behalf from the date of the receipt given for the goods under sub-section (2) of Section 42.

7. Sub-section (2) of Section 42 states that the Port Trust will issue a receipt on request by the owner of the goods to take charge of the goods for the purpose of performing the service or services and if such a receipt was issued the liability or responsibility in respect of such goods by the Port Trust would commence. The ordinary liability of a Port Trust is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act. However, omitting the words (In the absence of any special contract as in Section 152 of that Act) the position of the Port Trust even as a bailee did not operate making them liable unless the receipt as required by sub-section (2) of Section 42 was given by them in respect of the goods in their charge, Neither the defendants nor their principals had received any such receipt in respect of the goods which were alleged to have been unloaded in the Cochin Port. The relationship of bailor and bailee which existed between the Port Trust and the defendants or their principals could not be availed of by the appellants as there was no privity of contract between the Port Trust and the appellants before effecting the delivery of the goods. There was, therefore, no ground for the defendants to have cast the liability on the Port Trust in the circumstances of the case.

8. Article IV under the head "Rights and Immunities" in the Indian Carriage of Goods by Sea Act, 1925 referred to above provides the liability of the carrier as well as their agents in respect of the goods entrusted to them. Clause (q) of sub-section (2) of Article IV provides as follows:--

Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

9. The above provision is clear to show that the burden of proof is on the defendant who seek to claim an exemption as the agents of the principal, who was the carrier in the case denying liability in respect of their fault or neglect to give delivery of the goods to the appellants. The defendants in this case did not produce any evidence to show that they were neither at fault or neglect as the agents of the carrier. The evidence of D. Ws. 1 and 2 would go to show that the delivery of the goods while they were lying in the Port Trust rested with the defendants. That is an important piece of evidence though D. W. 2 sought to correct it in his re-examination. There was also no evidence that the carrier and their agents had performed their part of the contract in this case in giving delivery of the goods consigned in the ship of which the defendant is the agent.

10. In this regard, I refer to a decision reported in *Kalidas v. New Dholers Steamships Ltd. & Others* (1964 KLJ 378). It is relevant to quote the paragraphs 5 to 10 in the above decision to decide the question whether the liability of the carrier and their agents ceased when the goods were unloaded from the tackle of the ship. Paragraphs 5 to 10 reads as follows:

5. To decide the question whether the liability of the 1st defendant as carrier ceased when the goods were free of the ship's tackle one has to look into the nature of the liability of a carrier. The liability of a carrier is to carry the goods and deliver the same to the consignee or his agent at the place of destination. That contract can only be performed by giving delivery of the goods to the consignee. In the *Chartered Bank of India, etc. v. B.I. Steam Navigation Co. Ltd.*, (19 M.L.J. 316) Lord Macnaghten speaking for the Judicial Committee of the Privy Council observed that a bill of lading cannot be said to be spent or exhausted until the goods covered by it are placed under the absolute dominion and control of the consignee, and that the landing agents are intermediaries in their duties to both parties, agents of the ship owners as long as the contract remains unexhausted, and agents for the consignee as soon as the bill of lading is produced with the delivery order endorsed.

6. In *Szc Hai Tong Bank Ltd., v. Rambler Cycle Co. Ltd.* in 1959 A.C. 576) the Privy Council had to consider the question of the nature of the obligation of a carrier, and it was observed by Lord Denning that the fundamental obligation of a ship-owner is to carry and deliver the goods to the consignee, and that a provision in the bill of lading that the responsibility of the carrier would cease absolutely as soon as the goods are discharged from the ship, would not exempt the ship-owner from the fundamental obligation to deliver the goods to the consignee. In that case there was a provision in the bill of lading to the effect that "In all other cases the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom". It was held:

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea.

It was further held that a fundamental breach of the terms of the contract would disable a party from relying on an exemption clause, and that the exemption clause will have no operation in such a case as that would be inconsistent with the fundamental duty under the contract. One who fails to discharge one of the prime obligations of the contract, cannot seek exemption in a provision altogether freeing him from liability. See "Fundamental Breach of Contract" (77 L.Q.R. 98). This rule was explained by Denning L.J., in his judgment in *Spurling, Ltd., v. Bradshaw* (1956 1 W.L.R. 461, at 465). He said:

These exempting clauses are nowadays all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his

contract, not when he is deviating from it or is guilty of a breach which goes to the root of it. Just as a party who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so also he is disentitled from relying on an exempting clause.

For the scope and ambit of the rule of the fundamental breach of the contract, see also 19 Modern Law Review Page 26--"The Core of a Contract".

7. In Carver's "Carriage of Goods by Sea" 9th Edn., page 710, it is stated:

The undertaking of the shipowner by his contract is, that he will deliver the goods to certain indicated persons. We have to consider whether he can, under any circumstances, discharge that obligation in any way short of finding out those persons, and delivering the goods to them. Prima facie, no delivery can suffice except a personal delivery, to the agreed consignee, or his agents, until that has been made the contract remains unperformed.

At page 708 of the same book it is observed:

If the consignee of the goods does, not appear to claim and receive them, the master may land and warehouse them or take such other steps as may be proper for their protection. And consignee will be liable for any wharfage or other expenses properly incurred in doing so.

The learned author quotes the case in *Gatliffe v. Bourne* (1938 4 Bing N.C. 314) in support of this position. In that case "the contract was to deliver to the consignee in the port of London; instead of a delivery to the consignee, the goods were placed on Fenning's Wharf." It was held that delivery at the wharf was incomplete. It was also held that personal delivery cannot be insisted upon when there is custom in the port to the contrary.

8. At page 710 of the Carver's book it is said:

But personal delivery may sometimes be excused by an established course of business at the port. A delivery to certain other particular persons may, by virtue of the custom, be equivalent to a delivery to the consignee himself.

At, page 714 it is observed:

But if by arrangement, or following a usual course of business, the carrier at the end of the transit puts the goods into warehouse for their owner, to stay there until he is ready to take them, or until another person who is to carry them forward is ready to do so, the carrier ceases to be responsible as such; and becomes answerable only as a warehouseman for any want of reasonable care in keeping the goods.

At page 715 it is said:

He (the carrier) may therefore terminate his responsibility as carrier by warehousing them; and after doing so he becomes, subject to the statute as to warehousing, responsible as a warehouseman only. "When once the consignee is

in mora, by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman: he ceases to be liable in case of accident".....In Hong Kong Banking Corporation v. Baker (1870 7 Bombay H.C. Rept. 188) it was held that goods landed by the master at the customhouse wharf, and set a part there for the consignee, were still in the possession of the master as carrier after a reasonable time for taking delivery had elapsed. If the shipowner still holds the goods as carrier, he does so under the contract, and is entitled to the benefit of the exceptions.

9. In Australasian United Steam Navigation Co. Ltd. v. Hiskens (18 Commonwealth Law Reports 646) the scope and effect of a clause in a bill of lading which provided that the owner of the goods is take delivery at a certain place and all liability of the shipowner would cease as seen as the goods are free from the ship's tackle was considered, and it was held that such a clause would not relieve the ship-owner from liability for loss or damage to the goods arising from negligence, fault, or failure in the proper delivery of the goods, or lessen, weaken or avoid the obligation of the master, officers, agents or servants of the ship to properly deliver the goods. At page 655 Griffith C.J. observed:

A carrier is not entirely absolved from duty in respect of goods entrusted to him of carriage merely by reason of the failure of the consignee to take delivery of the goods at the stipulated time, but that so long as he has them in his possession he is bound to deliver them to the consignee (subject, of course, to any lien), and that in the meantime an obligation arises by implication of law to take reasonable care of the goods. His obligations and liabilities are in that case the same in effect as those of a bailee of goods.....both described his position as that of an involuntary bailee.

Issacs J. in the same case observed at page 664:

It is elementary that a common carrier of goods is bound to deliver them safely if he can validly insist on a stipulation for liberty not to deliver them at all.....He discharges his contract when he delivers his goods. And the point of that case was that until he did deliver the goods his contract was not discharged. Now, what is meant by delivery? This is covered both by reason and authority. Taking authority first, we have the distinct statement of Willes J. in Meyerstein v. Barker that there can be no complete delivery of goods until they are placed under the dominion and control of the person who is to receive them.

He quoted the observation of Cockburn C.J., Chamman v. Great Western Railway Co. (5 Q.B.D. 278, at 282). The quotation is as follows:

When once the consignee is in mora by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident.

Issacs J. also quoted the observation of Crompton J. in *Great Western Railway Co. v. Crouch* (3 H. & N., 183 at 197), which is as follows:

It seems to me that, according to the general law, where a carrier undertakes to carry goods to a particular place, he must deposit them for a reasonable time if the consignee is not ready to receive them.

In *Hongkong and Shanghai Banking Corporation v. T. Baker* (6 Bombay H.C. Rept. page 71), the defendant received goods on board his steamer under a bill of lading which exempted him from liability for loss occasioned by the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatsoever nature or kind, and lawfully landed them on the Custom House Bunder at Bombay, where they were accidentally burned before they were delivered to the consignees. It was held that,

A carrier by sea is obliged to make an actual delivery of goods carried by him to the consignee; but such prima facie obligation may be affected by the custom of the Port where the goods are to be delivered.

Couch C.J., delivering the judgment of the court said at page 81:

That the landing is lawful, and not a breach of duty or of the contract, and the consignee is bound to take delivery from the Custom House bunder instead of the ship, and to pay the proper charges for landing; but that the goods remain in the possession of the master by his agents, and are not delivered under the bill of lading.....And in *Gatliffe v. Bourne* the Court say they think the shipowner is acting during the whole of the time whilst the goods are in his possession under the obligation of a common carrier.

10. From these authorities it appears to me to be clear that the obligation of the 1st defendant as carrier did not cease as soon as the goods were free of the ship's tackle. It is also clear that the clause in the bill of lading which provided for cesser of liability on the part of the shipowner as soon as the goods were free of the ship's tackle would not exempt the first defendant from its liability as a carrier until the goods are delivered to the consignee or his agent unless there is a custom to the contrary in the port. There is no proof of any such custom here. The 2nd defendant was the landing agent and was really acting as the agent of the 1st defendant, and the demand made by the 3rd defendant, for watching charges was made by it as agent of the 2nd defendant in the course of its employment as sub-agent of the first defendant. If the 2nd defendant was holding the goods after landing them as the agent of the carrier, the act of the 2nd defendant in detaining the goods until the watching charges of the 3rd defendant were paid, was an act done by it in the course of its employment, and therefore the 1st defendant was liable for its Act.

11. On an analysis of the Indian as well as foreign decisions on the point, the learned judge had come to the conclusion that both the principal and agent were liable under the terms of the Bill of Lading and the opinion is expressed in para

10 above. In *Hongkong Shanghai Banking Corporation v. T. Baker* (1869 6 Bom C.R. 71) it is held that the landing of goods and setting them apart for the consignee at the Port did not constitute a delivery of the goods to the consignee, but such goods after being so landed continued to be in the possession of the master carrier. In *Mylappa v. B.I.S.N. Co. Ltd.*, (A.I.R. 1918 Mad 341) it is held that the liability of a shipping agent was co-extensive with that of its principal. The same view has also been held in (Firm) *Haji Shakoor v. Volkart Brothers* (A.I.R. 1937 Sind 11). Under the general liability as if there was a contract to the contrary against the provisions of Section 230 of the Contract Act, the present defendant as agent could be held liable for the claim on the basis of the terms of the bill of lading itself. The clause (B) in red ink in Ex. D1 or Ex. P2 may be read. It is as follows:

Exemption and Immunities of All Servants and Agents of the carrier: It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

12. In the light of the above provision as pointed out in *Orissa Textile Mills Ltd. and Another Vs. Ganesh Das Ramkishun*, in respect of certain other provisions in the contract between the principal and agents, it was held as follows in the above decision:

Held that Cl. 5 of the order and the agency agreement clearly indicated a contract to the contrary within the meaning of S. 230 of the Contract Act, and, therefore, defendant 2 could not claim immunity from liability. The liability of defendant 2 was general, and, as such he would be liable on the contract sued upon, unless he established the existence of one of the circumstances, mentioned in clause 5 of the order which alone could exempt him from liability. This defendant 2 had failed to do. He was therefore, liable on the contract sued upon.

13. It is also relevant to mention in this regard the decision reported in *Haji*

Shakoor Gany Firm v. Volkart Bros. (A.I.R. 1931 Sind 124) which also held that the liability of the shipping agents for acts of the ship would be co-extensive with that of the ship.

14. In view of the above decisions, and the facts and circumstances of the case, I am constrained to hold that the defendants did not make delivery of the goods in question to the appellants as and when they wanted after they were removed from the tackle of the ship and the defendants continued to be in possession of the same until open delivery of the goods was given to the appellants' agent on 10-5-65. The goods being in the possession of the defendants until the open delivery they shall be held liable to make good the loss to the appellants. The appellants are, therefore, entitled to a decree as against the defendants. In the result, in allowing the revision petition, the decree and judgment of the court below are set aside. The appellants are given a decree against the defendants for the sum of Rs. 303.28 with proportionate costs in this court as well as the lower court.