(1925) 08 MAD CK 0027

In the Madras High Court

Gandha Korliah APPELLANT

Vs

Janoo Hassan RESPONDENT

Date of Decision : 24-08-1925

Acts Referred:

Citation : AIR 1926 Mad 175 : (1926) ILR (Mad) 200 : (1925) 49 MLJ 738

Judgement

1. This case raises a point of some interest that has been much discussed in the English Courts and has very recently been the subject of a decision

by Mr. Justice MacLeod, as he then was, sitting in the High Court of Bombay. Boggiano and Co. v. The Arab Steamers Co. Ltd. ILR (1915) B

529. It is not disputed by the appellant that if Mr. Justice Macleod''s judgment is correct he is out pf Court. The defendant was the owner of two

steamers which were chartered by the plaintiff for the carriage of rice from Akyab to the Coromandel Coast. The importation of rice was only

permitted--and Mr. Justice Waller, the Trial Judge, has very rightly found that this was a fact perfectly within the knowledge of the parties--if and

when a certificate could be obtained from the Food Comptroller. The learned Judge has also rightly found--and this part of his judgment is not

challenged--that neither party to the contract committed himself to a guarantee that such a certificate would be forthcoming. As to that no question

arises and the learned Judge therefore thinks that the execution of the contract became impossible owing to an act which is neither under the

control of the parties nor which they had put themselves in the position of having warranted to be in existence, namely, the certificate. In these

circumstances the shipper says that he is entitled to be paid back certain moneys which he had paid to the shipowner and these moneys are described in the contract as being paid for freight at the rate provided for in the charterparty.

1. Rs. 450 only advance on acceptance of charterparty and to be deducted from the freight of second trip.

2. Half of the freight to be paid as the vessel reaches Akyab and takes the cargo.

3. The balance freight to be paid as the vessel reaches the port of destination.

4. It is sought to be said by the appellant in this case that this contract between the parties is not to be regarded as being governed by the general

law of India laid down in the Contract Act but by the English Common Law. The appellant''s vakil has very properly accepted the position that in

circumstances such as the present the money that passed from one hand to the other is recoverable by Indian Law but irrecoverable by the English

Common Law. If that were all that was to be said about it, it is quite plain that we should have to be guided by the Statute Law that obtains in this

country and should not be justified in going past the Indian Statute to the English Common Law ; but a very ingenious argument is put forward, the

same argument that was really put forward in the Bombay case. It is said that a ship in this position is a common Carrier and that in accordance

with the decision of the Privy Council in The Irrawaddy Flotilla Company v. Bugwandas (1891) ILR 18 C 620 (PC) the contract between the

parties is not to be supposed to be governed by the Indian Contract Act but by the English Common Law regarding the liabilities and rights of

common carriers. It is said that the moment you show that a person is a common carrier you have proved the existence of a certain type of

contract of a special kind which, according to the Privy Council decision, is not governed by the provisions of the Indian Contract Act. There

appear to me to be two objections and the first is this : that it is more than doubtful whether a ship under charter as distinct from a general ship

taking the goods of several shippers under separate bills of lading on the same voyage is properly described as a common carrier at all. It is not

necessary to decide that point fortu-nately in this case but it is one that has been frequently discussed in commercial circles and amongst

commercial lawyers for the past 70 years and there are a very considerable number of expressions of opinion by eminent commercial lawyers on

the Bench that a chartered ship is not a common carrier. If that be right, the appellant''s case is ended at once. It appears to me that we can put the

case on an even more solid footing than that in the following way. Let us assume that in a contract of carriage by sea all those features which are

peculiar to the contract of affreightment are governed by the English Common Law and therefore would not be touched even in this country by the

provisions of the Indian Contract Act. But there are other incidents in the relation of ship-owner and shipper in a contract of affreightment which

are in no way peculiarly confined to a contract of affreightment and which are independent of the special provisions of maritime law. That that is so,

I think, is clear from many of the cases which were cited before us, so that the question narrows itself down to this, is money paid in the present

circumstances by way of an advance freight a special feature of a contract of affreightment deriving all its validity and force from the law maritime

or does it derive its validity and force from the general English Common Law ? The answer is to be found in the decision of the Divisional Court in

Blakeley v. Mutter and Co. (1903) 88 L T 90 which is reported as a foot-note to the Civil Service Co-operative Society, Ltd. v. The General

Steam Navigation Company (1903) 2 K B 756. There Channel, J., dealing with one of the Coronation cases as they are commonly called,

expressly says that it is an incident of the English, Common Law and says that it is the same principle of the Common Law which prevents the

refunding of advance freight on a charterparty where the voyage is not completed and the freight therefore not earned. That way of putting it was

assented to in the judgment of the Earl of Halsbury, L.C. Lord Alverstone, C.J. and Cozens-Hardy, L. J. where after citing the passage which I

have read, the Earl of Halsbury, L.C. says he concurs with every word of that. If that be the right principle that was laid down by Channel, J. it

follows that the inability in England to recover advance freight on the frustration of the venture is derived from the general principles of the common

law and not from any supposed peculiar incident at- taching to maritime contracts of affreightment. That being so, even if a chartered ship is a

common carrier, the answer would be that matters relating to the recoverability of freight paid in advance although they happen to occur in a

charterparcy which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary common law or statute law, whether English or Indian. Then you get back to this position : that being the common law of the land or the statute law of the land--

and the general principle is different in India from what it is in England--therefore, just as we should apply the common law in England, so we

should apply the express statute that obtains in India. It therefore seems to me that we should take the view that, whether a chartered ship is a

common carrier or not, nevertheless the general principle of the Indian Contract Act applies and advance freight when paid can be recovered back

by the shipper on the frustration of the venture. That appears to be in accordance with the view expressed by Phillips and Odgers, JJ. in

Sivanadian Chettiar v. Batchu Surayya (1924) 48 MLJ 413. Our decision is also in accordance with that in Boggiario and Co. v. The Arab

Steamers Co. Ltd. ILR (1915) B 529 with which we respectfully agree. The appeal will be dismissed with costs.