
(1949) 02 CAL CK 0004
In the Calcutta High Court
Case No : Suit No. 1528 of 1945

Gangadin Mangturam

APPELLANT

Vs

Sindhia Steam Navigation Company Ltd.

RESPONDENT

Date of Decision : 07-02-1949

Acts Referred:

Citation : (1949) 02 CAL CK 0004

Judgement

Chatterjee, J.—This suit is for the recovery of Rs. 2,156-5-6 against the Sindhia Steam. Navigation Company, Ltd., and the Commissioners for the Port of Calcutta for damages for non-delivery of two bales of piecegoods.

2. On October 24, 1944, three bales of cotton piecegoods were made over to Messrs. Sindhia Steam Navigation Company, Ltd. (hereinafter called the Shipping Company) at Bombay by one Jagannath Jiwanmall, from whom the Plaintiff purchased the said goods. On that day the shipping company signed a bill of lading whereby they agreed to carry the said three bales of dhooties and sarhees on board its ship "S.S. Jalamohan" from Bombay to Calcutta and to make the same over to the Plaintiff firm at Calcutta. Particulars of the said bales are as follows:

(1) One bale of piecegoods No. 5031 containing two hundred pieces of sarhees; No. 8214.

(2) One bale of piecegoods No. 5219 containing two hundred pairs of sarhees; No. 2657.

(3) One bale of piecegoods No. 5116 containing three hundred pairs of dhooties; Nos. 5871 to 5875.

3. The bill of lading was assigned and made over to the Plaintiff at Calcutta and there is no dispute that the property in the goods had passed to the Plaintiff.

4. The shipping company delivered only one bale, being bale No. 5031, containing two hundred pieces of sarhees to the Plaintiff but failed to deliver the

other two bales, viz., bale No. 5219 "containing two hundred pairs of sarhees and bale No. 5116 containing three hundred pairs of dhooties. The Plaintiff's agent went to the jetty of the Port Commissioners on the day of the arrival of the ship in Calcutta, namely, November 17, 1944, and also thereafter, but he could not get any information, regarding the two bales.

5. On December 6, 1944 the Plaintiff wrote to the officer-in-charge of the Barhabazar police station and informed him of the bill of lading and of the delivery of only one bale on November 22. The Plaintiff wanted the police authorities to make an enquiry, so that he could get the two bales of piecegoods. On December 7, the Plaintiff wrote to the shipping company recording the nondelivery of the two bales and requested them to take immediate action and to communicate the result thereof. The Plaintiff enclosed a copy of the letter, which had been addressed to the police authorities. A similar letter was sent to the Jetty Superintendent of the Port Commissioners on that day.

6. It appears that the letter of December 7 reached the shipping company on December 18. On December 20, the shipping company wrote to the Plaintiff that "S.S. Jalamohan" has discharged all her cargo at the Port Commissioners shed and the Plaintiff was asked to approach the port authorities for the two bales in question. The correspondence shows that the Plaintiff was approaching both the port police and the Jetty Superintendent of the Port Commissioners for getting delivery of the two bales, but without any result. On January 17, 1945, the Port Commissioners reported that the two bales were not traceable and they were prepared to issue a short landing certificate on payment of the prescribed fee. On January 19, the Plaintiff wrote to the shipping company pointing out that the position was most anomalous. The port authorities had denied receipt of the two bales and the shipping company has asserted that all the cargo had been discharged. Naturally, the Plaintiff was at a loss to understand as to who was responsible for the loss and wanted to know who would pay compensation for such loss.

7. On March 14, a landing certificate was issued by the port authorities certifying that only one bale had been landed from "S.S. Jalamohan". On April 11, the Plaintiff's attorney, Mr. B.M. Bagaria, wrote to the shipping company demanding payment of the value of the two bales and interest thereon. The attorney also wrote to the Port Commissioners and claimed the value from them, if the statement of the shipping company that all the bales had been discharged at the Port Commissioner shed was correct.

8. On May 3, the Port Commissioners repudiated liability as the two bales could not be traced in their shed. On August 23, Mr. Bagaria again wrote to the shipping company and pointed out that the statement in their letter of December 20, was not consistent with the landing certificate issued by the port authorities and enquired whether the shipping company had any thing in writing to show that they had in fact landed the three bales at the shed of the Port Commissioners.

9. On the same day, i.e., August 23, Mr. Bagaria wrote to the Port Commissioners enquiring whether they had issued a certificate u/s 91 of the Calcutta Port Act to the shipping company for three bales of cotton piecegoods per "S.S. "Jalamohan".

10. At last, on August 27, the shipping company wrote to Mr. Bagaria asking for the submission of claim-bill in triplicate with the Port Commissioners landing certificate and other documents, but they were careful to add that the letter should not be treated as a letter of acceptance of the Plaintiff's claim. By that time the period of limitation was about to expire and this suit was instituted on September 4, 1945. More than two months later, on November 21, the shipping company wrote to Mr. Bagaria complaining that the claim forms had not been submitted.

11. On the conflicting statements by the shipping company and the Port Commissioners, the Plaintiff had to join both of them as Defendants and claimed a decree against either of them. At the trial it was conceded that the Port Commissioners were not liable, as they had in fact not got the three bales and only one bale had been landed at the shed of the Port Commissioners and that the statement of the shipping company in their letter of December 20, 1944, was not correct. This situation had been brought about by the conduct of the shipping company. The Commissioners for the Port of Calcutta are dismissed from the suit. The Plaintiff will pay the costs of the suit of the said Defendant in the first instance, but the Plaintiff will be entitled to add the same to their costs and realise the same from the Defendant No. 1, the Sindhia Steam Navigation Company, Ltd.

12. The following issues were raised:

(i) Is the Sindhia Steam Navigation Company, Ltd., exempted from liability in view of Clause 12 of the bill of lading?

(ii) Is the Plaintiff entitled to make any claim in view of the special condition endorsed on the bill of lading as to the period of limitation for making a claim?

(iii) What relief, if any, is the Plaintiff entitled to?

13. The arguments centred on two clauses of the bill of lading. The bill of lading was granted subject to certain express conditions. One of such express conditions is:

No claim for short delivery, short landing, non-delivery, total loss or any other claim whatsoever in respect of the within-mentioned goods will be entertained unless made in writing within one month from the date of arrival of the vessel.

14. It is urged by Mr. B.C. Mitra, Learned Counsel for the shipping company, that this claim is really for short delivery or non-delivery and, therefore, it cannot be entertained, because no claim was made in writing within one month from the date of arrival of the vessel. "S.S. Jalamohan" arrived in Calcutta on November 17, 1944. The first intimation of non-delivery was given in the Plaintiff's letter of

December 7, 1944, and that letter was received by the shipping company on December 18, 1944. Therefore, the Plaintiff is out of time by one day. It is further contended that the letter of December 7 was not really a claim. In my view, there is no substance in the last contention. There is no form prescribed with regard to the submission of the claim. All that the condition says is that a claim must be made in writing within one month of the date of arrival of the vessel. The letter dated December 7, 1944, along with its enclosure, intimated the Defendant company that the Plaintiff was complaining about nondelivery of the two bales No. 5219 and No. 5116. They also got particulars of the ship on which the cargo had been placed as also of the relevant bill of lading. It is rather curious that the letter which was despatched from 198, Cross Street in Calcutta on December 7 reached the shipping company's Calcutta office at Wellesley Place eleven days later, but that is what is recorded in the shipping company's letter dated December 20, and that position has been accepted by the counsel for the Plaintiff. It is urged that the claim was made within one month from the date of the arrival of the vessel, because the date of the arrival of the steamer should be excluded and, therefore, the claim was within time. There is a special provision in the Indian Limitation Act, Section 12, which says that, in computing the period of limitation prescribed for any suit or appeal or application, the day from which such period is to be reckoned shall be excluded. This rule as to the computation of the period of limitation applies in cases of certain legal proceedings. In my opinion, the principle underlying Section 12 of the Limitation Act ought to be applied to the construction of a contract like the bill of lading. If this express condition is valid, then, in my view, the Plaintiff firm did not fail to make a claim within one month from the date of the arrival of the vessel and it should not be non-suited on the ground, inasmuch as the day of the arrival of the vessel should be excluded. *Radcliffe v. Bartholomew* (1892) 1 Q.B. 161 and *South British Fire and Marine Insurance Company v. Brojo Nath Shaha* ILR (1909) Cal. 516. See also 32 Halsbury, Hailsham Ed., paras. 200 and 207-8.

15. Learned Counsel for the Plaintiff, Mr. A.K. Sen, urged that, both the condition with regard to the submission of claim within one month as well as Clause 12 of the bill of lading, on which the Defendant has relied, are ultra vires and are null and void being repugnant to the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925.

16. The relevant portion of Clause 12 of the bill of lading is as follows:

The company will not be accountable for goods of which the value exceeds Rs. 500 for any one package unless the value thereof shall have been declared in writing prior to shipment, and a specially written shipping order or advice note is granted for the same which must be presented to the commander at the time of shipment and the bill of lading signed with the nature and value of the goods appearing thereon and extra freight in respect of the same agreed upon and paid.

17. Obviously each of the packages or bales in this case was worth more than Rs. 500 and, if this clause applies, the Plaintiff's suit must fail. Learned Counsel

for the Plaintiff points out that on the top of the bill of lading it is expressly mentioned as follows:

All the terms, provisions and conditions of the Indian Carriage of Goods by Sea Act, 1925, and the schedule thereto are to apply to the contract contained in this bill of lading, and the company are to be entitled to the benefit of privileges, rights and immunities contained in such Act, and the schedule thereto, as if the same were herein specifically set out. If anything herein contained be inconsistent with the said provisions it shall, to the extent of such inconsistency, and no further, be null and void.

18. Both the Learned Counsel drew my attention to the Carriage of Goods by Sea Act (XXVI of 1925). That Act gives statutory effect to the Hague Rules which were recommended for international adoption by the Conferences on Maritime Law held at Brussels in October, 1922 and in October, 1923. Almost all the States forming the British Commonwealth of Nations as well as France, Belgium, the U.S.A., Norway and Denmark have given statutory effect to the Hague Rules. The purpose of the Carriage of Goods by Sea Act is to standardise within certain limits the rights of the holders of bills of lading against the shipowners (Scrutton, Charter-Parties, 15th Ed., p. 439). The rules mentioned in the different articles in the schedule to the Act have radically changed the legal status of sea carriers under bills of lading and have imposed on the shipowners a precise liability and have given them precisely defined rights and remedies in place of the previous freedom to contract in any terms they pleased. *Gosse Millard v. Canadian Government Merchant Marine Limited* (1). Under the Act and the rules, which cannot be varied in favour of the carriers by any bill of lading, their liabilities are precisely determined.

19. Article I of the schedule deals with definitions. Article II deals with risks and provides that in every contract of carriage of goods as defined in Article VI, the carrier shall be subject to the responsibilities and liabilities contained in Article III and entitled "to the rights and immunities contained in Article IV, Rule 5. Rule 5 of Article IV reads as follows:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding ?1,000 per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure abovenamed.

Neither the carrier nor the ship shall be responsible in any event for loss or

damage to or in connection with goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

20. In my opinion, the express condition, which prescribes a period of limitation for submission of a claim, as well as Clause 12, which exempts the shipping company from all liability, unless goods of the value exceeding Rs. 500 for any one package, in the absence of a special declaration, and special shipping order or advice note and payment of special freight are repugnant to the Carriage of Goods by Sea Act and, therefore, are void and inoperative. All the terms, provisions and conditions of the Act of 1925 and the schedule thereto are expressly, made applicable to the contract contained in the bill of lading. The shipping company is entitled to the benefit of the privileges, rights and immunities contained in that Act and the schedule thereto, as if the same were specifically set out in the bill of lading. The bill of lading further says that if anything contained therein be inconsistent with the provisions of the said Act or the schedule thereto, it shall, to the extent of such inconsistency, be null and void. The Articles in the schedule to the Carriage of Goods by Sea Act impose on the carrier certain minimum responsibilities, which he cannot reduce, or from which he cannot contract out, e.g., the obligation to exercise due, diligence to provide a sea-worthy ship and properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods and the Articles put upon him the liability for the proper and careful conduct of these operations while giving him certain maximum exemptions which he cannot increase (Scrutton, "Charter-Parties," p. 442).

21. In my view, Clause 12 of the bill of lading is inconsistent with Rule 5 of Article IV of the schedule to the Act. That rule states that a carrier and the shipper can make special agreement only in respect of goods exceeding ₹100 per package and only in such a case there may be a special stipulation that the nature and value of such goods must be declared by the shipper before shipment and inserted in the bill of lading. By agreement between the carrier and the shipper another maximum amount other than ₹100 may be fixed, but Rule 5 expressly states that the maximum shall not be less than ₹100 per package. Clause 12 of the bill of lading, insisting on a special declaration and special conditions in respect of goods exceeding Rs. 500 per package, is repugnant to Rule 5 and is null and void. Rule 5 cannot be varied in favour of the carrier in the manner it is sought to be done by Clause 12 of the bill of lading.

22. In my view, the express condition prescribing a special period of limitation is clearly repugnant to Clause 8 of Article III which states as follows:

Any clause, covenant or agreement in a contract of carriage relieving the carrier from liability for loss or damage to, or in connection with, goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.

23. The Express condition which says that no claim for show delivery or non-delivery will be entertained unless made in writing within one month from the date of arrival of the vessel relieves the carrier from liability for loss or damage and certainly affects or lessens its liability to carry and discharge the goods as provided in that Article and, therefore, that express condition, in contravention of the Carriage of Goods by Sea Act, is null and void and is of no effect whatsoever.

24. I have been referred by the Learned Counsel for the Plaintiff to the judgment of His Lordship Harries C.J. and Mukherjea J. in *British Indian Steam Navigation Company, Ltd. v. Hafez Shamshed Ahmad* (1948) Appeal from Original Decree No. 60 of 1946 decided on Jan. 12. I had the privilege of appearing as counsel for the Respondent in that case. In October, 1943, a merchant despatched from Cochin to Calcutta 1,500 tins of cocoanut oil by the defendant company's vessel "S.S. Tanfield". A bill of lading, dated October 8, 1943, was issued in respect of the goods and the Plaintiff became the endorsee for value of the bill of lading and the owner of the goods shipped. The steamer arrived at the Kidderpore Docks on October 28. A number of tins of cocoanut oil was delivered to the Plaintiff between October 28 and November 8. Out of the entire consignment four hundred and six tins were never delivered. The plea was taken by the shipping company that the bill of lading required three days notice of the damage or loss and in its absence the shipping company was free from liability. Reliance was placed upon certain provisions of the Cochin Carriage of Goods by Sea Act which was substantially in the same terms as the Indian Carriage of Goods by Sea Act. Under these Acts a suit must be instituted within one year from the date of delivery and if the goods were not delivered within one year from the date when the goods should have been delivered. Clough J. was of opinion that Clause 20 of the bill of lading, which required notice of three days from the discharge of the goods, was repugnant to the provisions of the Carriage of Goods by Sea Act and, therefore, it was null and void. Harries C.J., on appeal, was of the same view and held that Clause 20 was repugnant to the Indian and Cochin Acts and, therefore, was not applicable to that case. The learned Chief Justice referred to Clause 8 of Article III of the schedule to the Indian Act. There was also in that bill of lading an over-riding clause making the provisions of the Carriage of Goods by Sea Act applicable to the contract. It was pointed out that, if the provisions of the Carriage of Goods by Sea Act were incorporated in the bill of lading, then Clause 20 of that bill must be regarded as void by reason of Rule 8 of Article III. This is a judgment of the Court on appeal from a judgment of a Judge on the Original Side and I am bound by this judgment. Clause 12 of the bill of lading in this case relieves the carrier from liability for loss or damage to or in connection with the goods arising from the negligence, fault or failure in the duties and obligations provided by the relevant rules in Article III of the Carriage of Goods by Sea Act and, therefore, it is also null and void and of no effect.

25. Mr. Mitra has argued that the express provision prescribing a notice of claim within thirty days is not a provision relieving the carrier from liability, but it only makes the submission of claim within a certain time a condition precedent to the

accrual of the cause of action. In my opinion, there is no force in this contention. This point is concluded by the judgment of the learned Chief Justice in the above case. I set out the relevant portion of that judgment:

Mr. Chaudhuri argued that the provisions of Clause 20 of the bill of lading, making it essential that a notice of claim in writing should be made within three days after discharge, was not a provision relieving the carrier from liability. His contention was that Clause 20 of the bill of lading merely made a notice of claim within three days a condition precedent to the enforceability of the claim. He argued that, whether a notice was given or not, the ship-owner remained liable and Clause 20 merely dealt with the enforceability of the claim rather than with the liability of the ship-owner. In my view, however, it is clear from the very terms of Clause 20 that, if notice in writing was not given within three days of the discharge, the company ceased to be liable. Clause 20 in terms provides that, unless such notice is given, the company shall be free from all liability. It is, therefore, clear that this clause was a clause which relieved the carrier from liability in certain circumstances.

There was, under the rules in these Carriage of Goods by Sea Acts, a liability upon the ship-owners to discharge the goods which had been shipped with them. In this case there was a clear failure to perform that duty and the learned Judge has rightly found upon the evidence that 406 tins were never discharged. In those circumstances, Clause 20 would relieve the ship-owner from all liability, whereas the rules issued under the Acts made him liable. The result, therefore, is that Clause 20 must be regarded as repugnant and void and cannot be pleaded by way of defence to this case.

26. The decision of the Judicial Committee in *Australasian United Steam Navigation Company, Limited v. Hunt* (1921) 2 A.C. 351 has been referred to. In that case, goods were shipped from Fiji under a bill of lading, which provided that no claim for loss or damage should be enforceable unless made within seven days from the date at which the cargo was, or should have been, landed. The ship was unseaworthy and the goods were damaged because the refrigerating chambers were defective. The shippers did not lodge any claim within seven days. Viscount Haldane held that the clause in the bill of lading weakened or lessened the shipowner's obligation under the Fiji Sea-Carriages of Goods Ordinance No. XIV of 1906 and, therefore, was void u/s 4 of the said Ordinance, which prescribed that, where any bill of lading contains any clause, whereby the obligation of a ship-owner to make and keep the ship's refrigerating chambers fit for the carriage and preservation of the goods should, in any wise, be weakened, lessened or avoided, that clause should be illegal and void. Their Lordships of the Judicial Committee were of the opinion that the condition in the bill of lading, prescribing a written claim within seven days from the date of the landing of the cargo, affected the substance of the right conferred by the Ordinance, and, therefore, the relevant clause or condition in the bill of lading, by which the absolute right to recover damage due to failure to keep the refrigerating

chambers in good condition, was "in any wise weakened, "lessened or avoided", must be treated as void. In the Cochin case cited above, Harries G.J. held that the Australasian case was conclusive and observed that the relevant clause in the bill of lading in that case, which attempted to relieve the carrier from liability in the circumstances not recognised by the rules issued under the two Acts relating to the Carriage of Goods by Sea, was void. The same principle applies in this case. The express J condition in the bill of lading in terms relieves the shipping company from liability unless the notice is given within the period mentioned therein. By the Carriage of Goods by Sea Act and Rule 8 of Article III therein such a clause is null and void and cannot be availed of by the carrier. See also Scrutton on "Chapter-Parties", 15th Ed., pp. 338 and 462.

27. Both the contentions urged by the shipping company are thus over-ruled. I decide both the issues (i) and (ii) in the negative. On the question of quantum of damages, my attention has been drawn to *Rice v. Baxendale* (1861) 7 H. and N. 96 : 158 E.R. 407 and *India General Navigation and Railway Company, Ltd., v. Eastern Assam Company, Ltd.* ILR (1920) Cal. 1027 and to the notification issued by the Government of India, Department of Industries and Civil Supplies, No. 34-Tex (15)/43, dated September 20, 1943, which authorised the maximum retail price to be determined by adding 20 per cent, to the ex-mill or actual price. Where a carrier fails to deliver goods, the measure of damages is the value of the goods at the place of destination. The last clause in the bill of lading which restricts the damage to the invoice value of the goods is repugnant to Rule 8 of Article III of the Sea Carriage Act and is null and void. I do not allow the interest claimed.

28. I pass a decree for Rs. 2,011-8 with costs. Interest on judgment at 6 per cent, per annum.