

(1986) 09 KL CK 0019
In the High Court Of Kerala
Case No : A.S. No's. 8 and 23 of 1979

General Traders Ltd. and Another	Vs	APPELLANT
Pierce Leslie (India) Ltd. and Others		RESPONDENT

Date of Decision : 12-09-1986

Acts Referred:

Bills of Lading Act, 1856 — Section 1
Transfer of Property Act, 1882 — Section 92

Citation : AIR 1987 Ker 62 : (1987) 1 ILR (Ker) 237

Hon'ble Judges : K.T. Thomas, J;K.S. Paripoornan, J;K.P. Radhakrishna Menon, J

Bench : Full Bench

Advocate : T. Karunakaran Nambiar, Mathews P. Mathew, Philip Mathai and K.P. Vijayan, for the Appellant; P.S. Narayanan, S.R.D. Prabhu, K. Hymavathy, K. Prabhakaran, P.K. Jose, Leelamma George and P.K. Alexander Vaidyan, for the Respondent

Judgement

Thomas, J.—Will the liability of a carrier of goods by sea cease on discharge of the cargo from the tackles of the vessel ? Can the owner of a ship escape liability, if the ship is chartered by another under a Charter Party ? Whether the defendants are entitled to the defence of "act of God" in this particular case ? These are the broad questions to be answered in these two connected appeals, though of course, some other ancillary questions also call for determination. A Division Bench of this Court, which heard these appeals, referred them to a Full Bench as the questions involved are "generally important enough to be considered by a Full Bench."

2. Briefly stated, the facts are as follows : "S. S. Lucky Three of Panama Flag" is a vessel owned by the first defendant, Wing on Steamship Company, which carries on business at Hongkong among other places. The said vessel was chartered by M/s. General Traders Limited (2nd defendant), a West Indies based concern, under Charter Party dated 8-1-1972. M/s. Cashew Corporation of India Ltd., a Government of India undertaking, (CCI, for short), engaged defendant 2 to tranship 15,000 bags of raw cashew nuts of Kanyan origin from Mombasa to

Calicut. The goods were shipped at Mombasa in S. S. Lucky Three during early February, 1972. On receiving the consignment, the Master of the ship drew three bills of lading, Exts. B2, B3 and B4. The vessel arrived at the port of Calicut at 9.40 a.m. on 23-2-1972. Calicut is not a roadstead port, and there is some distance between the piers and the place nearest therefrom where the ship can reach. Hence, barges were used to transport goods from the ship to the piers. M/s. Malabar Steamship Company, Bombay, (the 3rd defendant), having branch office at Calicut, carried out lightering work as local agents of defendant 2 Company. But in the course of the lightering process, a number of bags of cashew nuts were jettisoned from the barges and a few other bags fell into the sea during unloading of the goods on the piers. Thus there was short delivery of 1350 bags of cashew nuts, besides the shortage of 4369 Kgs. of raw cashewnuts since 284 bags were delivered in torn and slack condition. The total loss was estimated at Rs. 1,99,537.90. The suit is for recovery of the said amount with interest.

3. The first plaintiff is M/s. Pierce Leslie India Limited and plaintiff 2 is New India Assurance Company Limited. Their case as revealed in the plaint, in short, shows that the CCI had allotted the said consignment to the first plaintiff even while the goods were on board the ship, that the bills of lading were entrusted to plaintiff 1 who became the holders thereof for value, that the consignments belonged to plaintiff 1 ever since the assignment in favour of plaintiff 1, and that the CCI was thereafter acting only as agents of plaintiff. The loss and/or damage caused to the consignment, according to the plaintiff, was entirely due to the negligence on the part of defendant 2 as well as their agent, defendant 3, in discharging the cargo from the steamer to the lighters when the weather was not conducive enough to transshipment, and that the lighters or barges used by defendant 3 were unfit and unseaworthy, or at any rate, unsuitable to protect the cargo in rough weather. According to the plaintiffs, the haste in discharging the cargo into the lighters despite the bad weather was only on account of the imprudent anxiety of defendant 2 to somehow empty the steamer of its cargo and leave the port at the earliest. By reason of the said act or omission, misfeasance, malfeasance and non-feasance, the defendants are jointly and severally liable to make good the loss, contended the plaintiffs. The further contention is that plaintiff 2 were the insurers of the said consignment and they paid the amount of loss to plaintiff 1 and thereby were subrogated to the rights and remedies of the insurer, and hence, plaintiff 1 has no objection in granting a decree in favour of plaintiff 2.

4. Separate written statements were filed by the defendants. They all admitted the shipment of the cargo in the vessel S. S. Lucky Three covered by Exts. B2, B3 and B4 bills of lading. They also admitted that the goods were lost as quantified in the plaint. It is the common case of the defendants that when the cargo was discharged from the vessel, the weather was calm and there was no warning about any deterioration of the weather. But, according to them, the sea became rough unexpectedly when the lighters reached almost near the piers,

and the gale became so strong that the loaded lighters started pitching and tossing against each other and also against the piers, when the weather was at its highest fury, heavy swells caused the water to flow into the lighters and thereby created panic in the minds of the crew that the boat, with the cargo and the crew, would get sunk. The defendants contended that at the said stage, in order to save human lives and at least some part of the cargo, the crew jettisoned some of the bags to make the barges lighter. According to them, the barges were all quite suitable and seaworthy. The defendants contend that they are entitled to plead the defence of "act of God".

5. The first defendant disclaimed liability on the ground that there is no privity of contract between them and the consignees, since defendant 2 were carriers of the goods and the contract is only between defendant 2 and the shipper. The bills of lading issued by defendant 2 are binding on the shippers and the plaintiffs, whereas defendant 1 who is a stranger to those bills is not bound by the same. One of the contentions commonly adopted by the first and 2nd defendants is that the carriers have no responsibility for the goods after discharge of the goods from the ship beyond its tackles and that lightering work was arranged by defendant 3 on "merchants account" only. The first defendant questioned the jurisdiction of Courts in India to try the suit. The 2nd defendant further contended that the bills of lading were not endorsed for value. "According to them, the suit, without the lightermen on the party array, is bad for non-joinder of parties. They also question the competence of plaintiff 2 to sue the defendants and they do not admit the agreement of subrogation between plaintiff 1 and plaintiff 2.

6. The Court below repelled the challenge regarding want of jurisdiction and the contention regarding non-joinder of parties. The Sub Judge found that the first defendant's liability does not cease with the execution of the Charter party with defendant 2 that plaintiff 1 is entitled to damages on the strength of the bill of lading, and that the property in the goods had been transferred by the CCI in favour of plaintiff I. Regarding the plea of "act of God", the lower Court declined to rely on the evidence of the defendants and found that the loss was occasioned due to the negligence in discharging or unloading the goods. The 2nd plaintiffs case that the rights and remedies of plaintiff 1 stood subrogated to the former was upheld by the learned Sub Judge. On the strength of the aforesaid findings, the Court below passed a decree against all the defendants for the amount claimed in the plaint with interest and costs. The first and the 2nd defendant challenge the above decree in these appeals.

7. The challenge on the ground of want of territorial jurisdiction is not pursued by the appellants nor did they press their objection regarding non-joinder of parties. The main contentions urged by both the counsel for the appellants are, firstly that the carrier's liability on a bill of lading is only to the consignee which, in this case, is the CCI and that since plaintiff 1 is not an endorsee of the bills of lading, the carrier has no liability at all towards him; and secondly that the cargo was

jettisoned on account of the sudden deterioration of the weather condition which is an act of God. Counsel for the first defendant argued that at any rate, the liability, if any, cannot be fastened on defendant 1 since the ship in which the goods were stowed had been chartered by defendant 2, thereby exempting the ship owner from all, the liabilities arising from the shipment of goods.

8. If the defence based on the rule of "act of God" is found sustainable, it is sufficient to shield the defendants against the present action for damages. Hence, we will examine that contention first.

9. All the defendants, in their written statements, have stated that the weather was relatively calm during the forenoon on the date of arrival of the ship and discharge operations were carried out during that period, but subsequent thereto, the weather took a wild turn with squall and tornado, raising swells in the sea, consequent to which the barges began tossing and heaving, threatening the sinking of the lighters. The crew found it imperatively necessary to throw at least some of the cargo overboard in order to save the remaining goods and also the lives of the men in the lighters.

10. When a party seeks asylum under the defence of act of God, it is not enough that he makes a plea that the weather turned wild, or that a gale or a tornado developed and swells of height rolled up in the sea. Oceanic vicissitudes are not unknown. Fury of the waters near and off the shore is part of the erratic peculiarities of the sea which sailors anticipate during voyage. Such odds are occasionally faced by the seamen in maritime adventures. A carrier of goods by sea, if absolved from liability merely on account of fury of waters, the consignee of the cargo would very often go without his goods delivered and his loss reimbursed. A ship and her accessories must be so adapted or attuned as to afford adequate protection for the crew and the cargo in the ship against such tempestuous behaviour of the sea. The rule of "act of God" has a special attribute in the law of torts, its legal connotation has acquired appreciable limits in the case law.

11. In the text book on Tort by Winfield and Jolowics page 444 (12th Edn. By W. V. H. Rogers) the doctrine of "act of God" is discussed. That defence applies "in circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility". This defence was first recognised by Blackburn, J. in the celebrated case, *Fletcher v. Rylands* (1866) LR 1 Exch 265-280. The House of Lords in *Greenock Corpn. v. Calidonian Railway* 1917 AC 556 considered the scope and ambit of *damnum fatale* (act of God) in a case where a concrete paddling pond was constructed by the Corporation in the bed of a stream, altering the course of the stream, and owing to a "rainfall of extraordinary violence", the stream overflowed at the pond and consequently water poured into the town damaging the properties of two railway companies. Their Lordships held that:

"The dam must be made perfect against all extraordinary falls of rain -- else the

protection is not afforded against the operation which the party must accomplish. An extraordinary fail of rain is a matter which, in our climate, cannot be called a *damnum fatale*-"

In *Gushing v. Walkar & Sons* (1941) 2 All ER 693 the question considered was Whether the defendants could escape liability on account of "blowing a terrible gale with an easterly wind". According to Hallet, J., for the wind to amount to an act of God as a defence in law, "the wind must not merely be exceptionally strong, but must be of such exceptional strength that no one could be reasonably expected to anticipate or provide against it". In *Greenwood Tileries Ltd. v. Clapson* (1937) 1 All ER 765 their Lordships considered at page 771 a contention whether a high tide which produced the pressure which caused a wall to collapse will amount to an act of God. Branson, J. observed thus :

".....I do not think it is possible to say that this tide was so high and so unexpected and incalculable as properly to fall within the definition of act of God."

The case law thus supports the principle that mere erratic peculiarities of the sea or even a gale or tornado resulting from the fury of the sea may not by itself amount to "act of God" unless the fury is of such a degree or dimension that no human foresight can provide against and of which human prudence is not bound to recognise the possibility.

12. None of the defendants had laid factual foundation in the written statement to make out a defence on the rule of "act of God". It is not enough for the defendants to merely state in the written statement that the jettisoning of the cargo was a consequence of act of God. Defendants have no case that the tempest or gale in the sea was so heavy or so unprecedented that the sailors could not have taken precautionary measures with reasonable foresight. When there is want of pleadings of facts necessary to constitute "act of God", it is idle to contend that such a defence is available to the defendants. Apart from the insufficiency of the pleadings, the evidence let in by the defendants, even if found reliable, will not show that the jettisoning of goods was on account of causes falling within the ambit of the rule of act of God.

13. Learned Sub Judge has discussed the evidence in detail and he expressed his inability to accept the evidence of witnesses who said that the sea became rough during the afternoon of 23-1-1972. The learned Sub Judge has rightly rejected the testimony of the witnesses for the defendants who deposed that they remembered the details of the condition of the sea at the place where the ship was lying in anchorage which happened nearly five years prior to the date of giving evidence. The non-production of the "log book" of the ship has been very scathingly commented against by the learned Sub Judge and adverse inference was drawn against the defendants for not producing not only the ship's log book, but also the log books kept in the lighters as well. No exception can be taken to the said reasoning of the learned Sub Judge, even though such a detailed discussion of the evidence would have been unnecessary in view of the paucity of

pleadings to constitute a defence on the rule of "act of God".

14. On the next question whether the carriers' liability ceases with the discharge of cargo beyond the tackles of the vessel, a scrutiny of the bills of lading will be useful before we discuss the law on that point.

15. Exts B2, B3 and B4 are the three bills of lading in this case. All the three bills contain identical clauses and hence, a reference to anyone of them will be sufficient for the purpose. We shall, therefore, take Ext. B2. Clause 4 in Ext. B2 reads : "The carrier or his agent shall not be liable for loss or damage to the goods during the period before Loading and after discharge from the vessel, howsoever such loss or damage arise". The appellants' contention is based on the words "after discharge from the vessel". To buttress the argument, reference is made to Clause 7 also, it reads : "Any lightering in or off ports of loading or ports of discharge has to be in the account of the merchant". Any construction of those clauses without reference to Clause 8 as also the introductory portion of the bill of lading would be a distortion. Clause 8 says that: "Loading, discharging and delivery of the cargo shall be arranged by the Carriers' agent unless otherwise agreed.....The merchant or his assign shall take delivery of the goods as fast as the vessel can deliver.... but only if required by the Carrier...." It is specifically provided in the prefatorial portion of the bill that the goods shipped are for "carriage to Calicut or so near thereto, as the vessel may safely get and lie always afloat, which are to be delivered in the like good order and condition at the aforesaid port unto the order or to his or their assigns". A literal approach to the words "discharge from the vessel" would give rise to preposterous consequences, for, a discharge from the vessel can take place sometimes even in the high seas, and if a consignee is to abide by such a discharge, it will tantamount to practically writing off his goods. Discharge from the Vessel is intended to deliver the goods to the consignee and until the consignee is in a position to take delivery of the goods, the discharge from the vessel is not incomplete. Discharge of the goods beyond the tackles of the vessel may be sufficient in cases where the ports of disembarkation are provided with wharfing facilities, or ports where anchorage is possible in roadstead. In ports like Calicut, where a transhipment of the cargo from the vessel to the piers is inevitable, lightering of the goods is the course normally resorted to for unloading the cargo on the shore. In such circumstances, the words "discharge from the vessel" must be given a pragmatic interpretation to mean that the goods are to be discharged from the vessel in such a condition as the consignee can take effective delivery of the goods.

16. The Privy Council, while dealing with a similar clause in a bill of lading, held that the carriers were liable for damages, if no delivery is made to make the goods available to the consignee. (See *Hai Tong Bank v. Rambler Cycle Company* (1959) 3 All ER 182. The material words of the relevant clause in the bill of lading involved in that case read thus: "The responsibility of the carrier.... shall be deemed to cease absolutely after the goods are discharged therefrom". Lord

Denning (as he then was) speaking for the Privy Council observed in the said case thus :

"If the exemption clause, on 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. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said : "Of course not". There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it.....if such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract".

Halsbury in para 659 (Vol. 43 of the Fourth Edition) quotes from Abbott's Law of Merchant Ships and Seamen : "A loss occurring during the discharge, but before the delivery to the consignee is complete, falls on the ship owner." The law on the point is thus clear, that unless the terms of the contract specifically provide otherwise, the carrier's responsibility would continue until the goods are unloaded on the shore. The term "discharge from the vessel", unless the contract otherwise, indicates, would mean effective and actual discharge in such a reasonable manner as to enable the consignee to take delivery of the goods.

17. The next question to be considered is whether the first plaintiff is entitled to get their loss reimbursed on the strength of the bills of lading. It is not disputed that an endorsee of a bill of lading is as much entitled to the goods as the consignee himself. It is also not disputed that Exts. B2, B3 and contain the signature of the consignee, which is sufficient to make an endorsement in blank. The dispute on this score is twofold. Firstly, it is argued that as a matter of fact, the consignee did not endorse the bills in favour of the first plaintiff. Secondly, it is contended that since the first plaintiff did not produce the bills of lading to defendant 3, plaintiff 1 cannot be treated as the assigns of the consignee. This also is a question depending mostly on the facts of the case.

18. As pointed out above, the vessel arrived at Calicut at about 9.30 a.m. on 23-2-1972. Transactions which preceded the above event have a bearing on the determination of the question as to whether plaintiff 1 has valid title to claim the goods. Ext. A13 is a letter dated 4-2-1972 issued by the Deputy Marketing Manager of the CCI, to plaintiff 1 informing the latter that 1200 metric tonnes of raw cashew nuts had been allotted to plaintiff 1. The first plaintiff accepted the allotment as per Ext. A14 letter. Ext. A15 is a copy of the first plaintiffs letter dated 21-2-1972 informing the CCI that the price of the cashew nuts was "being paid through cheque". The price paid by plaintiff 1 was more than rupees twentytwo lakhs. Ext. A18 is a communication sent by the CCI to the Customs Officer, Calicut, dated 22-2-1977 informing the latter that the CCI had "sold the entire quantity of 1200 MT. shipped from Mombasa to Calicut to M/s. Pierce Leslie India Ltd. when the vessel was in the high seas and that M/s. Pierce Leslie India Ltd. would be making necessary arrangements for the clearance of the

consignment". From the above documents it is clear beyond doubt that the property in the goods was transferred by the CCI to the first plaintiff even while the goods were on board the ship and while in transit. The consignee's signatures on* the bills of lading, though the endorsee is not named therein, is thus a strong circumstance to be considered along with the other materials adverted to above. The inference therefrom is irresistible that the first plaintiff is the assignee of the goods covered by the bills of lading. That apart, the plaint averment (vide para 3 of the plaint) that the first plaintiff "were at all material times the holders and/or endorsees of the bills of lading covering the said consignments and were entitled to take delivery thereof at Calicut" has not been specifically denied by the defendants in their written statements.

19. In a recent book "Bills of Lading In International Law and Practice" by Dr. Justice T. Kochu Thommen, reference has been made to different incidences of a bill of lading. At page 27 of the book, the learned author has stated that :

"A bill of lading is regarded as the symbol of the goods mentioned in it. An endorsement of the bill of lading while the goods are in the hands of the carrier may confer upon the endorsee all the rights and liabilities of the shipper as if the contract evidenced by the bill of lading had been originally made with him. An endorsement and delivery of the bill of lading is a symbolic delivery of the goods entitling the holder of the bill to physical delivery of the goods at the port of discharge".

Support for the above principles was sought to be made from the observations of Downen, L. J., in *Sanders v. Maclean* (1883) 11 CBD 327 : "A cargo to sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol; and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such endorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods". In *Halsbury's Laws of England* (in para 494, Vol. 43, 4th Edn.), the negotiability of the bills of lading is dealt with :

"On a transfer, therefore, of a bill of lading by way of sale, mortgage or pledge, the property in the goods passes either absolutely or otherwise, according to the intention of the parties, to the transferee, provided that the transferor was competent to dispose of them.....

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a delivery to the holder of the bill of lading, even where he is not in fact entitled to the goods, discharges the ship owner, provided that it is made in good faith without notice of any defect in the holder's title".

Reference is made to *Bristol and West of England Bank v. Midland Railway*

Company (1891) 2 OB 653 : "It is immaterial that the true owner did not become holder of the bill of lading until after the wrongful delivery". In this case it is pertinent to note that there is absolutely no dispute between the CCI and plaintiff 1 regarding the transfer of the property in the goods as can be seen from the transactions between them evidenced by Exts. A13, A14, A15 and Ext. X18. It is not for third parties like the defendants to contend that there is no valid transfer of the title of the goods as between the CCI and plaintiff 1.

20. It was contended on behalf of defendant 1 (the ship owner who is the appellant in A.S. 23/79) that since the ship was chartered by defendant 2, and since the stowage and transshipment was in pursuance of a contract between the charterer and the shipper, the owner cannot be made liable for any loss or damages arising during shipment of the cargo. The law on that point has been succinctly stated in Halsbury's Laws of England (para. 496, Vol. 43, 4th Edn.) :

"Even where there is a Charter Party, the bill of lading is prima facie, as between the shipowner and an indorsee, the contract on which the goods are carried. This is certainly so when the indorsee is ignorant of the terms of the charter-party, and may be so even if he knows of them. As between the shipowner and the charterer, the bill of lading may in some cases have the effect of modifying the contract as contained in the charter party, although, in general, the charter party will prevail, and the bill of lading will operate solely as an acknowledgment of receipt".

Again in para 534, it is stated :

"As between the shipowner and the charterer, the contract of carriage is contained in the Charter Party, in the absence of an agreement to vary it by the bill of lading. The terms of the charter party are not as such binding either on the shipper, where he is not the charterer, or on the consignee or indorsee of the bill of lading, whether he knows of its existence or not".

It is only when the terms of the charter party are incorporated in the bill of lading by which the owner is absolved from liability expressly or by necessary implication, that an owner will be entitled to use the same as a defence against a shipper or a consignee or an endorsee of a bill of lading. In this case a perusal of Ext. B35, which is the Charter Party as between the first and 2nd defendants, will be advantageous. In Art. 8 of Ext. B35 the parties to the Charter Party have indicated their intention not to absolve the owners from the responsibility of proper storage and correct delivery of the cargo. This shows that even apart from the legal rights of a consignee or endorsee as against a shipowner, the contract of affreightment itself specifically protects the rights of the endorsee to proceed against the ship owner as well.

21. The last point to be considered is the argument of the learned counsel for the appellants in A. S. 8/79 that plaintiff 2 is not entitled to get the decree prayed for, since the policy of insurance is only as between the CCI and the insurers. In other words, the contention is that the insurer had no obligation to indemnify the

loss sustained by the transferee of the CCI and even of the insurer did indemnify the loss, it is not a case where they are entitled to proceed against the carriers for reimbursement. The pleading in this case is clear enough to show that plaintiff 2 was "at all times the insurers of the consignment and had insured the consignment and by virtue of the subrogation deed executed in favour of them by plaintiff 1, the 2nd plaintiffs are entitled to sue as plaintiffs." Having found that plaintiff 1 is entitled to get their loss reimbursed, it is not open to the defendants to contend that the 2nd plaintiffs are not subrogees or assignees, of the first plaintiff. This is especially so when both the first and the 2nd plaintiffs are in the party array. The first plaintiff has no objection, and it is stated so in clear terms in the plaint, in passing a decree in favour of plaintiff 2 for the amount payable by the carriers to plaintiff 1, as plaintiff 1 got the entire amount paid by plaintiff 2. In this context reference can be made to a decision of the Division Bench of this Court in *New India Assurance Co. Ltd. and Another Vs. San Jose Maritime Ltd. and Others*, . The New India Assurance Company Ltd. filed a suit against a shipping company for realisation of damages for short delivery of goods. In that case also the CCI has transferred the property in the goods consigned to Kerala State Cashew Development Corporation Ltd., by receiving price thereof and the insurance company got itself subrogated to the rights of the transferee Corporation. It was held that the transferee corporation and the insurance company jointly, and the insurance company severally, would be entitled to maintain the suit for damages against the carriers of the consignment, there is no need to delve into the case law on the subject because this is a case where the endorsee and the insurance company have jointly filed the suit wherein the endorsee has unreservedly declare that they have no objection in passing a decree in favour of plaintiff 2. It is not open to the defendants to question the correctness of the terms of the assignment or subrogation as between plaintiff 1 and plaintiff 2 in this case. Therefore, we find no substance or merit in the aforesaid point raised on behalf of the appellant in A.S. 8/79.

No other point needs consideration in these appeals. We confirm the decree passed by the Court below and dismiss these appeals with costs.