
(1963) 12 KL CK 0014
In the High Court Of Kerala
Case No : A.S. No. 490 of 1959

Goverdhandas Kalidas

APPELLANT

Vs

New Dholera Steamships Ltd. and Others

RESPONDENT

Date of Decision : 02-12-1963

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Article 3
Limitation Act, 1908 — Article 62

Citation : AIR 1965 Ker 51

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : J. Renganatha Kamath, for the Appellant; C.S. Venketeswara Iyer, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The plaintiff is the appellant. The suit was to recover the amount paid by the plaintiff to the 3rd defendant as watching charges and also for damages for short delivery and other reliefs. The 1st defendant is a shipping company and the 2nd defendant was its landing agent. The 3rd defendant was a sub-agent employed by the 2nd defendant for the landing work etc. The plaint is founded on the following allegations. One Dwarakadas Panachand, a merchant at Mattancherry consigned 1560 bundles of coir rope and 619 bundles of coir yarn, for carriage to Karachi, in "S. S. Mosna" belonging to the 1st defendant on 30-3-1946. The goods arrived in Karachi on 26.4.1946. But before the goods reached Karachi Dwarakadas Panachand became insolvent, and the official receiver got the bill of lading and paid the freight. Thereafter the official receiver endorsed the bill of lading to one J. J. Malavia, who in turn endorsed the same for consideration to the plaintiff.

The plaintiff went to Karachi to take delivery of the goods. By the time the plaintiff reached Karachi, the goods were already discharged from the ship, and were lying in open air in the Karachi Port area. The plaintiff's agent paid Rs.

380.3.4 to the Port authorities as demurrage to get delivery of the goods. But the plaintiff's agent could not get delivery of the goods on account of the false, and exorbitant claim of the 2nd and the 3rd defendants for watching charges. The 3rd defendant demanded Rs. 9,000/- as watching charges before it would permit the 2nd defendant to part with the goods. After a good deal of bargaining the amount was reduced to Es. 2,000/- and the plaintiff paid this amount to the 3rd defendant. That amount was paid under protest. Not being satisfied with that amount the 3rd defendant wanted further amounts to be paid by the plaintiff and the plaintiff's agent had to pay Rs. 500/-more to the 3rd defendant before he could get delivery of the goods from the 2nd defendant. The plaintiff paid the amount also under protest as he had to get the goods immediately. The suit therefore was filed for recovery of these amounts as also for damages for short delivery and other claims which are not material for the purpose of this appeal.

(a) The 1st defendant contended that its responsibility ceased when the goods were free of the ship's tackle and that thereafter it had no liability for the acts of the and defendant or for that matter, of the 3rd defendant. It was further contended that the 3rd defendant was an independent contractor, that it had no vicarious liability for the acts of the 3rd defendant, that the suit was barred by limitation and that the plaintiff had no cause of action against it. The 2nd defendant filed a written statement contending that it was ready and willing to give delivery of the goods to the plaintiff and that the plaintiff was bound to pay the watching charges of the 3rd defendant. It also contended that there was nobody to take delivery of the goods as soon as they were landed, that the 3rd defendant had kept watch over the goods, that the claim for the usual remuneration by the 3rd defendant was justified, and that it was not liable for repayment of any amount. The 3rd defendant remained ex parte.

3. The court below found that the amounts which the plaintiff paid were paid under coercion, that there was no valid foundation for the claim made by defendants 2 and 3, and therefore they were bound to refund the amounts. As regards the question of the liability of the 1st defendant for the amount, it held that the 1st defendant had no liability, as its liability as a carrier ceased when the goods were discharged from the ship. It therefore dismissed the suit as against the 1st defendant, but decreed this claim only as against defendants 2 and 3.

4. In this appeal the plaintiff challenged the correctness of the decree passed by the court below on the ground that the 1st defendant was also liable for the amount as the amount was extorted by defendants 2 and 3 in the course of their employment as agents of the 1st defendant, and therefore there was a liability on the part of the fist defendant to repay the amounts. The finding of the court below on this aspect of the question is rather vague. It held that according to the terms of the bill of lading the responsibility of the 1st defendant ceased as soon as the goods were free of the ship's tackle; and that as the Port Trust was not made a party to the suit the plaintiff could not claim the amount from the Ist defendant. Now there is a provision in the bill of lading that the liability of the Ist

defendant would cease as soon as the goods are free of the ship's tackle. Condition No. 15 of the bill of lading reads:

"15. In all cases and under all circumstances the company's liability shall absolutely cease when the goods are free of the Steamer's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the Shippers or Consignee."

It was argued on the basis of this clause that the liability of the 1st defendant ceased the moment the goods were free of the ship's tackle and that thereafter the 1st defendant could not be made liable as a carrier for any act done by the landing agent or any sub-agent, employed by the landing agent.

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 *Chartered Bank of India v. B. I. Steam Navigation Co. Ltd*, 19 Mad LJ 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 domination 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 *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.* (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 shipowner 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 shipowner 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 *Spurting (J) Ltd. v. Bradshaw* 1956-1 W. L. E. 461

"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."

As to 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 the 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*, 1838-4 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 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 warehouse man only. When once the consignee is in more, 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 warehouse man: he ceases to be liable in case of accident. In Hong Kong and Shanghai Banking Corporation v. Barker, 7 Bom H. C. O. C. 186 it was held that goods landed by the master at the custom-house wharf, and set apart 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 Com-W. LR 646 the scope and effect of a clause in a bill of lading provided that the owner of the goods is to take delivery at a certain place "and all liability of" the shipowner would cease as soon as the goods are free from the ship's tackle was considered and it was held that such a clause would not relieve the shipowner 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 for carriage merely by reason of the failure of the consignee to take delivery of the goods at the Stipulated, place and 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 s." 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. But he cannot be bound to deliver them safely if he can validly insist on a stipulation for liberty nor 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. Barber 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. in *Chapman v. Great Western Railway Co.* (1880) 5 Q. B. D. 278 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*, (1858) 3 H & N. 183 at p. 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, & Borsani* H. C. O. C. 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 consignee. 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 (1838) 4 BNC. 314 the Court say they think the ship-owner 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 ship-owner as soon as the goods were free of the ship's tackle, would not exempt the 1st 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 1st 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. The next question for consideration is whether the suit was barred by limitation as against 1st defendant. Although there was an issue on the point the 1st defendant did not appear to have pressed that issue in the court below and therefore that court did not consider the question. The suit was admittedly brought more than one year after the plaintiff took delivery of the goods. Art. 3, Clause (6) of The Carriage of Goods by Sea Act, Act 26 of 1925 is 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.

In any event the carrier and the ship shall be; discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damages the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

It is clear from this article that a consignee complaining of loss or damage against the carrier must file the suit within one year after delivery of the goods or of the date when the goods should have been delivered. In this case it is clear that delivery was taken sometime in July 1946, and the suit was filed more than one year from that date. So prima facie the suit was barred by limitation. But it was contended for the appellant that the cause of action in this case was for recovery of money had and received from the defendants, and therefore Article 62 would apply to the facts of the case. I do not think that the argument is sound. In *The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar*, it was held by the Supreme Court that the period of limitation for a suit against a shipping company as carrier for loss or damage to a consignee of goods is only one year from the date of delivery of the goods or when the goods ought to have been delivered. The word "loss" as used in paragraph 6 is, in the opinion of their Lordships.

"intended to mean and include every kind of loss to the owner of the goods--

whether it is the whole of the consignment which is not delivered or part of the consignment which is not delivered and whether such non-delivery of the whole or part is due to the goods being totally lost or merely lost to the owner by such fact of non-delivery there is in our opinion "loss" within the meaning of the word as used in paragraph 6. It is worth noting in this connection that while paragraph 5 makes it clear that loss there means loss to the carrier and paragraph 8 speaks of loss or damage to, or in connection with the goods, the Legislature has in the 6th "paragraph of this Article left the words "loss or damage" unqualified. The object of the rule however being to give immunity to the carriers and the shippers from claims of compensation made by the owners of the goods in respect of loss sustained by them It will be unreasonable to read, the word "loss" in that paragraph as restricted to only loss "of the goods". When the object of this particular paragraph and the setting of this paragraph in the Article after the previous paragraphs are considered there remains no doubt whatsoever that the learned Judges of the Bombay High Court were right in their conclusion that the loss or damage in the paragraph, is a wide expression used by the Legislature to Include any loss or damage caused to shipper or consignee in respect of which he makes a grievance and in respect of which he claims compensation from the shipping company.

In this connection reference may be made to the case of *Ramlal v. B. N. Ry. Co.* Calcutta AIR 1936 Nag 21, Though it is a case relating to the liability of a Railway Company, the principle laid down there might as well apply to a shipping company. In that case the Eailway company purported to detain the goods of the consignee until the claim of the company in respect of wharfage was paid. It was held that the company did not cease to be carriers because they detained the goods in respect of their alleged claim for wharfage and that the company's claim arose out of their right as carriers. It was further held that the plaintiff cannot be heard to say that the company's position as carriers was at an end, and that the refusal to deliver the goods was unconnected with their position as carriers when their claim to detain the goods arose out of that position.

12. I think that the suit as against the red defendant can Only be considered to be a suit for damage on account of the unlawful detention of goods belonging to the consignee until certain claims of defendants 2 and 3 were satisfied. That being the nature of the action, the plaintiff's suit, as against the Ist defendant, must fail on the ground that it was Barred by limitation,

13. I therefore dismiss the appeal. Since the suit is being dismissed on a ground not apparently pressed by the Ist defendant in the court below, I make no order as to costs.