

(1954) 12 MAD CK 0020

In the Madras High Court

Case No : City Civil Court Appeal No's. 88 and 89 of 1952

Home Insurance Co. Ltd. and Another

APPELLANT

Vs

Ramnath and Co., Madras

RESPONDENT

Date of Decision : 10-12-1954

Acts Referred:

Bills of Lading Act, 1856 — Section 3
Carriage of Goods by Sea Act, 1925 — Article 3, 4
Contract Act, 1872 — Section 10, 151

Citation : AIR 1955 Mad 602

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Single Bench

Advocate : King and Partridge, for the Appellant; A.R. Krishnaswami, for the Respondent

Final Decision : Dismissed

Judgement

Basheer Ahmed Sayeed, J.—These are two appeals preferred by defendants 1 and 2 against the judgment and decree of the learned Second Additional City Civil Judge in O. S. No. 656 of 1950. The Home. "" Insurance Co. Ltd. represented by its agents, Messrs. Volkart Brothers, happen to be the appellant in C. C. C. A. No, 88 of 1952 and the Indian Steamship Co. Ltd., Calcutta happen to be the appellant in C. C. C. A. No. 89 of 1952.

2. The plaintiff company, who is the respondent brought a suit against the two appellants for directing them or either of them to pay a sum of Rs. 2000/- being the value of the goods with interest at six per cent, per annum and for costs. The plaintiff is a registered firm, currying on business at Madras. Defendant 1 in the suit is the Steamship company and defendant 2 is the Insurance company, having their agents at. Madras.

In May 1949 the plaintiff had purchased from Messrs. N. Jivanlal and Co, Ltd., Bombay, four drums of English sodium sulphide weighing 20 cwts. at Rs. 31/- per owt. and five drums of sodium Hydrosulphite weighing 1175 Ibs. at Re. 1 per

Ib. Under instructions from the plaintiff, the said Jivanlal and Co. Ltd. shipped the goods to Madras through defendant 1 company per its ship "S. S. Indian Shipper". Under similar instructions from the plaintiff, the said Jivanlal and Co. had also insured the goods with defendant 2 company.

The plaintiff honoured the draft sent by the vendors through the Indo-commercial Bank, Madras, for a sum of Rs, 1945-15-9, and obtained delivery of the documents of title from the said bank.

3. The ship "Indian Shipper" arrived at the Madras port on 28-5-1949. But when Sri Rama Vilas Service Ltd. went to dear the goods under instructions from the plaintiff, the goods had not " been landed at the port. Delendant 1 was informed of this fact, Though defendant 1 by his letter dated 8-7-1949 informed the plaintiff that a special search would be made at Colombo and at Calcutta to ascertain whether the goods were over landed at any one of those ports, nothing tangible, resulted therefrom.

As the goods covered by the bill of lading were not delivered, the plaintiff preferred a claim with defendant 1 for a sum of Rs. 2,000/-. After con-siderable correspondence, defendant 1 company on 26-10-1949 repudiated its liability under the bill of lading, 011 the ground that the bill of lading contained a condition that the goods were "shipped on deck at shipper's risk". Detendant 1 would appear to have also suggested to the plaintiff to prefer the claim against the Insurance company defendant 2.

Delendant 2 company also repudiated its liability on 12-12-1949, on the ground that the policy was issued on F. P. A. terms and that defendant 2 was not liable to make good the value of the goods lost or any portion thereof.

The plaintiff averred that neither defendant 1 nor defendant 2 could avoid liability to make Rood the loss of the goods covered by the said Bill of lading or by the policy of insurance on any of the grounds stated by them in the course of their correspondence. Therefore, the plaintiff brought the suit for file reliefs contained in para, 20 of the plaint.

4. In its written statement, defendant 1 company contended that the goods were carried with the consent of the plaintiff and at his risk on the "S. S. Indian Shipper" with an endorsement on the bill of lading that the goods were shipped on deck at shipper's risk and that since notice of the loss of goods not having been given as per Clause 10 of the bill of lading, they were not liable for the nondelivery of the goods or any loss arising therefrom.

Defendant 2 company in a long statement pleaded that the carrier, viz., defendant 1 company was under no liability to the plaintiff and there-fore, defendant 2 also had no liability to discharge in respect of the loss or non-delivery of the goods. Defendant 2 company denied that it was bound to indemnify the plaintiff to any extent, It also contended that the plaintiff's interpretation of Clause 8 of the Insurance Policy was not correct and that that

clause did not cover the loss suffered by the plaintiff.

5. The learned City Civil Judge framed only two issues, the first of which was whether defendant 1 was not liable for the suit claim, for all or any of the reasons set forth in paras. 6 and 8 of the written statement, and secondly whether defendant 2 was not liable to indemnify the plaintiff to any extent whatsoever. On both these issues the learned City Civil Judge found that defendant 1 was liable to the extent of the bill paid by the plaintiff, viz., Rs. 1945-15-9 with interest at 6 per cent, per annum on the same from the date of the suit and on the second issue, he found that defendant 2 was liable to indemnify the plaintiff only to that extent as per the terms of the insurance policy.

In the result, a decree was passed in favour of the plaintiff against both the defendants, disallowing a small amount in excess of the actual sum paid by the plaintiff company to its vendors in Bombay. Both the defendants have preferred these appeals, aggrieved by the judgment of the learned City Civil Judge.

6. Mr. Ramkrishna Sastri appearing on behalf of Messrs. King and Partridge, for the appellants in both the appeals, has very vigorously contended that since the goods were carried on deck with the consent of the plaintiff and subject to the condition that they were so shipped on deck at the shipper's risk, neither of the appellants could be made liable for the loss or non-delivery of the goods, or for any damage suffered by the plaintiff.

Before the point in issue could be discussed, it is necessary to state at this stage that there is no dispute with regard to the nine drums having been put on board the "S. S. Indian Shipper". The bill of lading is sufficient evidence to establish the fact that the goods were actually put on board and were received by the Master of the ship. It is also beyond dispute that the goods never landed at the Madras port. Neither the shipping company nor the insurance company have been able to trace the goods nor are they in a position to explain as to how the total loss of the goods had occurred.

It is indeed strange that this should be so. u/s 151, Indian Contract Act, in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. It is not shown by any evidence in this case that defendant 1 company took all the care and caution that was reasonably expected of a man of ordinary prudence in respect of similar goods,

The goods were 9 drums, and if they were put on the deck, certainly the shipping company as bailee should be in a position to state what steps it took in, order to prevent the disappearance of the goods in any manner whatsoever. But far from doing so, it is curious that the shipping company is not even in a position to say how exactly the goods were lost, what happened to them and at what stage.

In such circumstances, it cannot be said that the shipping Company has

discharged its duty u/s 151, Indian Contract Act, and if the goods have disappeared when they were in the custody of the shipping company, without the shipping company being able to account for the loss in any satisfactory manner which would absolve them from liability, it stands to reason that the shipping company must be made responsible for the loss of the goods to the consignor, the plaintiff company,

7. The learned counsel for the appellant shipping company, however, contends that his client, the Indian Steamship Co. Ltd. is completely absolved from liability by reason of the saving clause, viz., that the goods were shipped on deck at the risk of the shipper. His point is that the carrier can contract himself out of liability with the consignor and that when there is such a contract, the carrier will be protected against all loss by operation of a clause like "shipped on deck at the shipper's risk". There could certainly be no doubt that any carrier can contract himself out of his liability by entering into specific terms and conditions with the shipper of the goods.

But in such a case, it will depend upon what exactly is the significance and the scope of the contract which has been entered into between the shipping company and the shipper of the goods. The learned counsel contends" that a clause of the kind in question will absolve the shipping company even against total loss of the goods.

He relies upon a decision in -- "Lewis v. Great Western Rly. Co.", 1878 3 QBD 195 (A). In that case, the plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from London to Shrewsbury at owner's risk through the Great Western Railway. - .

As the plaintiff knew, the defendants had two rates of carriage, a higher rate, when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendant's liability. The defendants servants packed the cheeses in such a manner that during their transit upon the defendant's railway they were damaged, hut the defendants" servants did not know that damage would result from the mode in which the cheeses were packed.

The court of appeal held that as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable and that the injury to the cheeses had not arisen from the wilful misconduct of their servants.

But in the present case, there is no evidence that the plaintiff had knowledge of any lower and higher rate, nor is there any evidence to show that there existed such lower and higher rates for carrying the goods from Bombay to Madras. In the absence of such evidence, it cannot be inferred by any means that the plaintiff when shipping the goods hail the option in the matter of the choice of

the place where the goods were to be lodged in the ship or in the matter of restricting the liability of the defendant shipping company in case of any loss or damage to the goods. Nor is there any evidence to show that he chose the lower rates as against the higher rates which would naturally involve greater or lesser risk to the goods, dependent upon the variation of the rates.

Therefore, the facts of this case being quite different from those that obtained in the decision under reference, it is difficult to say how that decision would apply to the present case. Further, in that case the goods were damaged and it was not a case of total loss of the goods which remained unexplained. I am, therefore, of the view that the decision relied upon by the learned counsel is not of any assistance to him.

8. Learned counsel next invited my attention to a decision of a Bench of this court in -- British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, . In that case there was a comprehensive clause which had excepted the carrier from liability under any car cum stances whatsoever. The court interpreting the scope and operation of such a comprehensive clause, came to the conclusion that the English Common law applied and Sections. 151 and 152, Indian Contract Act could not affect the liability of the common carrier in the view that the liability of a common carrier for the loss, injury or delay, in respect of the goods carried, might be varied by a contract and that the contract before them was not opposed to public policy and that Section 23, Indian Contract Act did not apply.

The Bench was of the opinion that the bill of lading relieved the ship owner from any liability with regard to showing how the loss had occurred. The case law on the subject has been elaborately discussed in that decision and it is unnecessary for me to traverse the entire field. So far as the facts in the present case before me are concerned, it cannot be said that the special contract between the shipping company and the plaintiff is of such a comprehensive nature as to absolve the shipping company from all liability and so as to exclude Sections 151 and 152, Indian Contract Act from coming into operation.

Further, it has to be noted that in that case there was only short delivery of 44 bags out of 1532 bags shipped at Vizag to reach Madras harbour. It was not a case of total loss of the goods shipped. Once again, I have to observe that the facts in the present case not being on all fours with the facts in the decision relied upon by the learned counsel for the appellant, I am unable to see how that decision will be of any assistance to the appellant.

9. The learned counsel for the respondent has, however, invited my attention to a decision in -- "Mitchell v. Lancashire and Yorkshire Ry. Co.". (1875) 44 LJ QB 107 (C). I have read through the decision and I do not think that that decision is of any assistance in deciding these appeals. "the point that arose in that case was only with reference to the notice given by the carrier, after he had carried the goods to destination and warehoused them, asking the owners to take

delivery of the goods and the goods damaged in the meanwhile.

The facts of that case do not come anywhere near the facts in the present case. In the present case the clause "shipped on deck at owner's risk" does not contain any affirmative words to show that the shipping company was exempted from liability in any case and even in the case of total loss of the goods.

The question is whether it was the right of the carrier merely to receive the freight for carrying the goods and there was no obligation on the carrier to answer to the owner of the goods as to what exactly happened to the goods, which he was bound to deliver. The clause in the bill of lading limiting the liability of the carrier does not, in my opinion, appear to exclude the plaintiff's claim, if there occurred a total loss of the goods.

A reasonable interpretation has to be given to the saving clause as also the limits of liability clause found in the bill of lading, in the absence of any provision that the shipping company should not be liable, If the goods shipped on deck are lost in their entirety. The meaning of the saving clause could only be that the shipping company could not be made liable for any loss or damage caused to the goods by reason of the fact of the goods being on the deck instead of any other place.

If the shipping company were able to prove that the loss or damage to the goods arose by reason of the fact that they were put on the deck, then certainly to that extent the shipping company will not be liable. But in this case, there is no such proof that the total loss of the goods occurred by reason of their being put on deck or that such loss occurred after every care and caution having been taken by the carriers as men of prudence.

Such being the case, it is difficult to say that the shipping company was entitled merely to receive the freight and not to account for the goods or account for the manner in which the loss occurred. If such were the law, then in every case where goods are shipped on deck, the company could easily plead that a total loss had occurred and by reason of a saving clause that the goods are shipped on deck at the risk of the owner, could seek to absolve itself from any liability whatsoever.

If such a position were sound, then it will give rise to any amount of abuse of the contractual relationship between the parties, and there will be no end to the fraud that might be committed by carriers of goods and bailees, if the clause of the kind in question were to be interpreted as giving absolute immunity to carriers from any liability even in the case of total loss of the goods. In my view, the clause in question does not imply that in cases of total loss or non-delivery of the entire goods there is a total exemption from liability of the carriers.

The term "shipper's risk" should only mean such loss and such damage that might arise consequent upon the goods being put on the deck which of course will have to be proved by the shipping company. The loss must be related to the

goods being shipped on the dock. Therefore, in my view, defendant 1 must be held liable to the plaintiff for the value of the goods as decreed by the lower court. The clause that the goods are shipped on deck at the owner's risk will not be of any avail to defendant 1, in a case where the goods are totally lost and never delivered.

10. In the case of the insurance company, defendant 2, the learned counsel for the appellants contended that the plaintiff cannot succeed, unless "and until the loss of the goods was proved to have been due to a peril of the sea and the burden of proving that the loss was due to such a peril was entirely on the plaintiff. He further contended that so long as the burden is not discharged, the insurance company cannot be made liable. The learned counsel also referred to the extent of liability of the insurance company under the clause "warranted free from particular average". He has invited my attention to certain passages in the Law of Insurance in British India by N. Barweli 1940 Edn. at pp. 103, 118 and 107.

I do not think that the points commented upon in these passages do arise in this case because what is claimed by the plaintiff is merely the price of the goods and nothing more. "Particular average" meaning partial loss does not seem to have any relevance in the present case. Learned counsel for the appellant also invited my attention to Halsbury's Laws of England, Vol. XVIII, at pp. 186 and 322. He attempted to put a very restricted scope on the terms of the policy that all other perils, losses and misfortunes would not imply any loss on board the ship, unless it be of the particular type referred to in the clause in the insurance policy, Ex. A. 23.

The fact remained that in this case the goods were put on board the ship and they were carried through the sea, but they did not arrive at the port of destination.

The term "misfortunes" after having mentioned all the other perils of the sea, is found in the relevant clause in the insurance policy. It is difficult to say how the loss of the total goods on board the ship, when once it is proved that they were put on board, could be excluded from the scope and meaning of the word "misfortunes". The learned counsel for the appellant stated that according to the *eiusdem generis* rule, the misfortune should be of the same clause, category and character as those falling within the category "perils of the sea".

But I do not think that such a rule will apply in the present case, when almost all the kinds of perils of the sea have been exhaustively given in the list and when in addition to that, the word "misfortune" is also included. The insurance company, in my opinion, seeks merely to take shelter under the shipping company to avoid its liability for the loss of the goods insured with them. On a proper and reasonable interpretation of the clause contained in the insurance policy, the insurance company cannot escape liability for a total loss of the kind that has arisen in the present case, which loss must be put down to lie within the scope of

the terms "losses and misfortunes".

Merchants insure the goods with the company to cover any risk in their being safely landed at the port of destination and if the goods are not so landed, when once they were put "on board, and if the loss of the goods has arisen, then certainly it is a loss and a misfortune which is covered by the terms of the insurance policy. In my opinion, the insurance company cannot, therefore, be exonerated from its liability to honour its obligation to the insured. I am, therefore, of the opinion that on the facts of this case and in view of the terminology used, the insurance company as well as the shipping company will both be liable to the plaintiff.

11. In the result, the decree and judgment of the learned city Civil Judge is quite justified and proper, and the same is hereby confirmed. Both the appeals are dismissed with costs.