
(1990) 08 MAD CK 0016
In the Madras High Court
Case No : O.S.A. No. 11 of 1981

India Steamship Co. Ltd.

APPELLANT

Vs

Steel Authority of India Ltd.

RESPONDENT

Date of Decision : 16-08-1990

Acts Referred:

General Clauses Act, 1897 — Section 10
Limitation Act, 1963 — Section 4

Citation : (1990) 08 MAD CK 0016

Hon'ble Judges : Mishra, J;Bakthavatsalam, J

Bench : Division Bench

Advocate : S. Sampath Kumar, Kasturi Rangan and Ramanarayanan, for the Appellant; B. Rajagopalan, for the Respondent

Judgement

Mishra, J.—The defendant, India Steamship Company Limited has appealed against a money decree. The plaintiff, Steel Authority of India

Limited, successor-in-interest of Hindustan Steel Limited, filed the suit for the recovery of Rs. 2,25,798.33 with interest from the

defendant/appellant. Admitted facts are that the plaintiff entered into a contract bearing No. A/T.1117 dated 19th February 1974 with Mettelugie-

hande Gmbh, Berlin, for the supply of Prime CRCA Steel confirming to DIN 1623 St. 12-03 against their import licence

No./G/T/2397707/OR/46/H 35-36 dated 1.12.1972. The goods which were covered by the seller's invoice and packed in sheet metal boxes, 36

parcels in all, weighing 101.370 metric tonnes gross, were delivered to the vessel "Indian Tribune" owned by the defendant, at Rustock (West

Germany) for the destination Madras Vide Bill of Lading No. 1008/21 dated 11.2.1974. The vessel arrived at Madras Port on 6.6.1974,

discharged part of the cargo and then left for Calcutta on or after 14.6.1974. According to the plaintiff, the customs authorities on inspection found that many packets have no labels as well as markings were not according to the specifications; in some cases, there were no markings at all and in the case of some, the port of destination was shown as Bombay. Thus the Plaintiff came to know that the goods covered by the Bill of Lading have not been landed by the cargo ship concerned. The Madras Port Trust also issued a B Certificate stating that the 36 parcels show in the Bill of Lading were not landed by S.S. "Indian Tribunes " which arrived in Madras on 6.6.1974. The plaintiff therefore lodged their claim with the defendant to the tune of Rs. 2,27,080.44 made of Rs. 2,550.96 being the approximate insurance premium. On the request of the defendant, according to the plaintiff, the claim was split into two, one for Rs. 2,08,134.15 being the C&F value of 33 packages, shortlanded and approximate insurance and the other for Rs. 18,921-29 in respect of 3 packages. A sum of Rs. 1,268.85 towards insurance premium however was realised by the plaintiff from the defendant. The plaintiff accordingly filed a claim for the balance of Rs. 2,25,798.33.

2. The defendant in their written statement stated that according to the German commercial Code which applied to the transshipment concerned, the liability as carrier stood discharged in respect of losses and/or damage as no suit was brought against them within one year after the delivery of the goods or the date on which the goods should have been delivered. There was, according to the defendant, complete discharge of their liabilities as there was a complete extinguishment of their liabilities in terms of the law applicable to them. They also stated that the particulars such as contents, quality, quantity, condition and value of the consignment were unknown to the carrier and as carrier they were not responsible for the weight, measurement and gauge nor for specifications, brand or countermark value of the goods. They maintained that the shipper had not complied with the Iron and Steel Clause of the Bill of lading which only stated that 36 parcels prime C.R.C.A. steel sheets conforming to DIN 1623 St. 12.03 were shipped and gave no other details. All the goods of the said Bill of lading had been stowed in No. 2 Lower Hold and there was no other steel cargo in that hold or in any other hold of the vessel. In Madras, according to the defendant, the only steel cargo discharged was from the said hold

and consequently the cargo discharged could not belong to anybody other than the plaintiff. According to them, steel could be imported only by

the plaintiff and by noneelse and cargo of steel for Bombay, Calcutta or Madras was meant only for the plaintiff and noneelse. The marking on the

parcel was immaterial. As the plaintiff was the only consignee of such cargo, there was no chance of any mix-up, as the vessel did not carry similar

cargo to any other consignee. The defendant also stated that they were issued tally receipts by the Madras Port Trust u/s 39(3) of the Madras Port

Trust Act in respect of steel sheet bundles, one under marks H.S.L. Bombay, nine under marks H S L or NIL and 14 under nil marks and three

specific marks as contained in the Bill of Lading which were over carried to Calcutta and brought back by the same vessel to Madras. These tally

Receipts issued to them absolved them of liability under Sec. 39(3) of the Madras Port Trust Act in respect of 27 packages which they confirmed

by issuing out-turn statement dated 22.7.1974 and 20-8-1974 about the availability of the said packages in the harbor premises. A further plea

was also taken that in any event, under clause 10 of the Bill of Lading the defendant's liability if any would be limited to ₹½ 100 per package

equivalent to Rs. 1,865-65 at the date of the completion of discharge of the vessel and that even under the German Commercial Code to which the

Bill of Lading was subject, the defendant's liability, if any, was limited to DM 1250 per package.

3. The learned trial Judge framed several issues, including I: Is the suit barred by extinguishment of liability of the defendant as per provisions of the

Bill of Lading Clause No. 13? Has the defendant discharged the entire goods entrusted to it by the consignor, and if so, is not the defendant

absolved of liability of the suit claim? Did the plaintiff deliberately refuse to undertake delivery of its cargo as discharged by the defendant; and is

not the defendant's liability restricted to ₹½ 100 sterling per package or German DM 1250 per package; and answered all of them in favour of

the plaintiff except that with respect to the restriction per package; accepted the Gold Clause agreement.

4. We have omitted to mention some more facts stated in the plaint and the written statement. As we shall presently show, all contentions that were

raised before us are covered by the facts afore-mentioned, except such other facts which when relevant we shall state in deciding one or the other

contentions.

5. Mr. S. Sampath Kumar, learned counsel for the appellant, has contended that the learned trial Judge has committed error of law in confusing the

condition under which the suit was required to be filed within a period of one year of the delivery of the goods or the date on which the goods

should have been delivered with the law of limitation under which court is given the power to condone the delay or add in the computation of the

period of limitation so much of the time taken in the court or otherwise permissible under the law. He has developed this argument by asserting that

the law which governs the transaction between the plaintiff and the defendant provided inter alia that the liability would stand discharged and not

that the claim would be barred. But before we deliberate into it, some facts:-

6. The vessel landed in Madras on 6-6-1974, got berthed at Quay on 8.6.1974 and discharged its cargo on 14.6.1974. The period of one year

for filing the suit under the condition aforementioned expired on 13.6.1975. Mr. Sampath Kumar has drawn our attention to a judgment of the

Supreme Court in *The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar*, wherein the court considered

clause (3) of paragraph 6 of Article III in the Schedule to the Carriage of Goods by Sea Act (1925). The Supreme Court has, dealing with the

scope of the expression "'all liability in respect of loss or damage'" in clause (3) of paragraph 6 of the Act, observed:

It has to be noticed that before providing in the 6th paragraph an immunity to the carrier from "'all liability in respect of loss or damage'" in certain

circumstances the Legislature had in the earlier paragraphs laid on the carrier the duty or making the ships sea-worthy properly manning, equipping

and supplying the ship, and making the holds and all other parts of the ship fit and safe for the reception, carriage and preservation of the goods;

properly and carefully loading, handling, stowing, carrying, keeping and carrying for and discharging the goods carried and provided that ordinarily

the bill of lading should show the quantity of weight of the goods of the number or package or pieces. "Loss or damage" which paragraph 6

speaks of should therefore reasonably be taken to have reference to such loss or damage which may result from the carrier not performing "'some

or all of the duties which had been mentioned earlier. One of those duties'" is to

discharge the goods carried in accordance with the quantity or weight or the number of packages or pieces as mentioned in the bill of lading. The shipper and the consignee of goods are more concerned with the duty of the carrier to discharge the goods in proper order and condition and in full than anything else. Indeed the other duties cast on the carriers so far as the owners of the goods are concerned, are really incidental to this duty of discharging the goods in full and in good order and condition. When in the context of the previous paragraphs of Art. III the 6th paragraph seeks to provide an immunity to the carrier "from all liability in respect of loss of damage after a certain time, it is reasonable to think that it is loss or damage" to the owner of the goods, be he shipper or the consignee, which is also meant, in addition to the "loss of the goods" . When the goods themselves are lost, e.g. by being jettisoned, or by being destroyed by fire or by theft, there will be failure to discharge the goods in full and loss to the owner of the goods will occur. Even where the goods are not lost the carrier may fail to discharge the goods in full (sic) or not in proper order and there also loss will occur to the owner of the goods. In such a case, even though there may not have been "loss of the goods" the goods are lost to the owner. The word "loss" as used in Paragraph 6 is in our opinion 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.

Proceeding further, the Court observed:

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 this 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.

The Court further held that:

The date on which the goods "should have been delivered" clearly contemplates a case where the goods have not been delivered. The Clause

gives the owner of the goods one year's time to bring the suit - the year to be calculated from the date of the delivery of the goods where the

goods have been delivered and from the date when the goods should have been delivered where all or some of the goods have not been delivered.

Proceeding further the Court observed:

There is nothing however to justify the conclusion that the consignee is bound to avail himself of the right to claim as (sic) tenant in common. The

breach of contract remains and the claim for compensation for such breach is in no way affected. . .

Dealing with the scope of the expression ""when the goods should have been delivered"" in Clause (3) of paragraph 6, the court observed:

But whether the delivery has to be made to the consignee at the ship's side or is made on the quay side there can be little doubt that the carrier's

duty is to start the delivery of goods as soon as the ship arrives at the port of destination and to complete the delivery before the ship leaves the

port. In a particular case the carrier may not do his duty. That cannot however alter the fact of the existence of his duty to complete the delivery

between the arrival of the ship at the port and the departure of the ship from the port. If as regards any particular goods this duty remains

unperformed at the time when the ship leaves the port there can be no escape from the conclusion that the point of time when the ship leaves the

port is the latest point of time by which the goods should have been delivered

The court also observed:

But whether the delivery is to be made to the consignee or to anybody else on his behalf the duty of the ship's master is to start the delivery as

soon as possible after the ship's arrival at the port and to complete it before the date of departure from the port. Before the ship has actually left

the port it is not possible to say that the time when delivery should be made has expired. Once however the vessel has left the port it cannot but be

common ground between the carrier and the consignee that the time when delivery should have been made is over. It is this point of time viz., the

time when the ship leaves the port, which in our opinion should be taken as the

time when the delivery should have been made

7. The above gives out ½

1. The owner of the goods, in view of the language in clause (3) of paragraph 6 of the schedule of the Act (Indian Carriage of Goods by Sea Act,

1925) has got one year's time to bring the suit, the year to be calculated from the date of the delivery of the goods where the goods have been

delivered, and from the date when the goods should have been delivered where some or all the goods have not been delivered; and

2. If by the time ship leaves the port, the goods shipped or any part thereof had not been delivered, it will be a case of non-delivery of the goods

on the date when the goods should have been delivered. It is this point of time, that is to say, the time when the ship leaves the port which should

be taken as the time when the delivery should have been made.

8. In yet another judgment, American Export Isbrandtsen Lines Inc. and Another Vs. Joe Lopez and Another, the Supreme Court has reiterated

the law by extensively quoting from its judgment in the case of The East and West Steamship Company, George Town, Madras Vs. S.K.

Ramalingam Chettiar, and said:

From the passages quoted above, it is clear that this court had come to the conclusion that if by the time ship leaves the port, the goods shipped or

any part thereof had not been delivered, it will be a case of non-delivery of the goods on the date when the goods should have been delivered. In

that decision this Court has taken the view that the last date for filing the suit for "loss or damage" is one year from the date the ship left the port.

The cause of action for filing the suit for "loss or damage" is one (sic). Quite clearly, the claim in respect of short delivery is clearly barred by time.

If we are to accept the contention of the plaintiff that his claim in respect of the damage caused to the goods delivered to him, arose only on the

date when the goods were delivered to him, then it means that the plaintiff had two causes of action under clause (3) of paragraph 6, one relating to

the loss and another relating to damage. From the language of the clause in question it is not possible to accept that contention. As observed by this

Court in the decision referred to above the time when the ship leaves the port should be taken as the time when the delivery should have been

made. Any delivery which has not been made by that date comes within the

mischievous of Clause (3) of paragraph 6. We think that the question of law arising for decision in this case is covered by the ratio of the decision of this court in the East and West Steamship Company's Case (AIR 1960 S.C. 105) (supra).

Mr. Sampath Kumar has contended that in the instant case the Indian law may not apply as the Bill of Lading which also spells out terms and conditions and exceptions show

The shipowners are to be entitled to the benefit of all privileges, rights and immunities contained in the German Commercial Code (Seafrairechi) as if same were herein specifically set out. If anything herein contained be inconsistent with any compulsory provision of that law it shall, to the extent of such inconsistency and no further, be null and void. and,

Law Applicable:- This contract shall be governed by the Law of the country of shipment.

9. Mr. Sampath Kumar has also drawn our attention to the discussion in this behalf in the judgment of the learned trial Judge. The learned trial

Judge has taken notice of the fact that in this particular case the country of shipment is Germany. According to the commercial laws governing

carriage by sea contract issued by the Chambers of Overseas Commerce of the German Democratic Republic (Law Department), the liability to

pay damages will get extinguished when a claim is not enforced in Court within a year of the delivery of the goods or of that point of time when the

goods must have been delivered, and found.

However, applying the interpretation put by the Supreme Court in The East and West Steamship Company, George Town, Madras Vs. S.K.

Ramalingam Chettiar, . I am prepared to assume that the rule embodied in the German Code which provides for a period of one year for the filing

of a suit, is not a period of limitation and that consequently, the Limitation Act will not apply and the plaintiff cannot have advantage of Section 4 of

the Limitation Act. Admittedly, either Sec. 10 of the General Clauses Act (Central Act, 1897) or Section 11 of the Madras General Clauses Act)

(Madras Act 1 of 1891) do not apply.

He has submitted that having come to the above conclusion and taken notice of the law laid down by the Supreme Court, the learned trial Judge,

should not have allowed any time after 13.6.1975 to be reckoned even on the ground that the court was closed and that the forum of court was

not available to the plaintiff between 5.5.1975 till 25.6.1975 for filing the suit.

Learned counsel for the respondent has not contested the contention-

1. that the German Law would apply, that the German Code provided a period of one year for filing of a suit, that section 4 of the Limitation Act is

not available to the plaintiff or that the provisions of the General Clauses Act are also not available to it. He has, however, reiterated the argument

which he had advanced before the learned trial Judge that a Court shall not ignore the maxims

(1) Lex non cogit ad impossibilia: and,

(2) Actus curiae inem gravabit dammosus.

He has submitted that no law would ever compel a man to do what he was unable to do and that an act of court would prejudice no man. The

provisions in Section 4 of the Limitation Act or Section 10 of the General Clauses Act (Central Act) 1897 or Section 11 of the Madras General

Clause Act (Madras Act 1 of 1891) may not be apply to the case, yet the principles embodied therein must be extended to treat the period of one

year for the filing of the suit in the German Code to have been extended by the period of recess of the court until it allowed parties to file claims on

and from 25.6.1975. No doubt a distinction has been made between a provision fixing a period of limitation and a provision which uses the words

discharged from all liability"" and the Supreme Court has in the case of The East and West Steamship Company, George Town, Madras Vs. S.K.

Ramalingam Chettiar, delved into it saying:

The question we have to decide is whether in saying that the ship or the carrier will be "discharged from liability", only the remedy of the shipper or

the consignee was being barred or the right was also being terminated. It is useful to remember in this connection the International character of

these rules, as has been already emphasized above. Rules of limitation are likely to vary from country to country. Provisions for extension of

periods prescribed for limitation would similarly vary. We should be slow therefore to put on the word ""discharged from liability"" an interpretation

which would produce results varying in different countries and thus keeping the position uncertain for both the shipper and the ship-owner. Quite

apart from this consideration, however, we think that the ordinary grammatical sense of "discharged from liability" does not connote, "free from the remedy as regards liability" but are more apt to mean a total extinction of the liability following upon an extinction of the right. We find it difficult to draw any reasonable distinction between the words "absolved from liability" and "discharged from liability" and think that these words "discharged from liability" were intended to mean and do mean that the liability has totally disappeared, and not only that the remedy as regards the liability has disappeared.

and further:-

The distinction between the extinction of a right and the extinction of a remedy for the enforcement of that right, though fine, is of great importance.

The Legislature could not but have been conscious of this distinction when using the words "discharged from all liability" in an Article purporting to

prescribe rights and immunities of the shipowners. The words are apt to express an intention of total extinction of the liability and should, specially

in view of the international character of the legislation, be construed in that sense. It is hardly necessary to add that once the liability is extinguished

under this clause, there is no scope of any acknowledgment of liability thereafter.

Yet, a court of law must pause to consider whether the period of one year after which the right would become extinct would be a calendar year or

the year elongated by the acts of the court and the law that permitted the competent authorities to close the court for recess/and/or for reasons

beyond comprehension.

10. The learned Trial Judge has in this connection referred to quite a few authorities, including:-

1. Mayer Vs. Hording (L.R. 2 Q.B. 410).
2. Waterton Vs. Baker (L.R. 3 Q.B. 173)
3. Shoosha Bhusan Rudro and another v. Gobind Chunder Roy (I.L.R. 18 Cal 231).
4. Peary Mohun Aich Vs. Anunda Charan Biswas (I.L.R. 18 Cal 631):
5. Muhammad Jan Vs. Shiam Lal and Others,
6. Raja Pande Vs. Sheopujan Pande and others (Full Bench)(A.I.R. 1942 All 429).
7. Maqbul Ahmad v. Onkar Pratap Narain Singh (57 Allahabad 242),

8. Sambasiva Chari v. Ramaswami Reddi (I.L.R. 22 Mad 179) and

9. Madura Co. Private Ltd. Vs. A. Thangal Junju Musaliar and Another,

We shall not burden our judgment by a repetition of the words in those cases and the quotations in the judgment of the learned Single Judge. We

may, however, refer to Sambasiva Chari's Case ILR 22 Mad 179 (supra) in which the court faced a situation similar to the one as in the instant

case. The court recorded in its short order:

We are clearly of opinion that the provisions of the Limitation Act do not apply to extend the time of thirty days limited by sections 18 and 51 of

Act VIII of 1865 for bringing a summary suit to set aside a distraint. The cases Veeramma v. Abbiah ILR 18 Mad. 99, Appa Rau Sanni Aswa

Rau v. Krishnanmurthi ILR 20 Mad. 249 and Kumara Akkappa Nayanam Bahadur vs Sithala Naidu ILR 18 Cal. 231 place the matter beyond all

doubt. Nor is section 10 of the General Clauses Act nor section 11 of the Madras General Clauses Act applicable inasmuch as they do not refer

back to Acts of the year 1865. But there is a general principle of law which has been recognised in two recent cases by the High Court of Calcutta

Shooshee Bhusan Rudro vs Gobind Chunder Roy ILR 19 Cal. 631 at p.g. 634 and Peary Mohun Aich vs Anunda Charan Biswas ILR 22

Cal.176 that where parties are prevented from "doing a thing in court on a particular day not by any act of" their own, but by the act of the Court

itself they are entitled to "do it at the first subsequent opportunity. We see no reason why this principle should not be followed in cases like the

present when it has been adopted as a rule of law in cases to which the Limitation Act and General Clauses Act apply. We, therefore, rule that the

plaint in this case, which was filed on the thirty-first day after the distraint, was filed in time, the thirtieth day being a Sunday on which the Court

was closed in accordance with the Rules of this Court.

The Kerala High Court, in a case of Madura Co. Private Ltd. Vs. A. Thangal Junju Musaliar and Another, has said:

We have come to the conclusion that the principle above-mentioned a rule of "elementary justice" as stated in Raja Pande vs. Sheopujan Pande

AIR 1942 All 429 will sustain the contention of the 1st respondent that the plaint filed on 28-5-1956 was a plaint filed within time. Mayer vs

Harding 1867 2 Q.B. 410 is a case in point. In that case the appellant had

applied to justices to state a case under the Summary Jurisdiction Act, 1857. He received the case from them on Good Friday, and transmitted it to the proper court on the following Wednesday. It was held that he had complied sufficiently with the requirement of the Act directing him to transmit the case within three days after receiving it as it was impossible for him to transmit the case earlier than he did because of the closure of the offices of the court from Friday till Wednesday. Mellor, J., dealt with the matter as follows:

Here it was impossible for the appellant to lodge his case within three days after he received it. As regards the conduct of the parties themselves, it is a condition precedent. But this term is sometimes used rather loosely. I think it cannot be considered strictly a condition precedent where it is impossible of performance in consequence of the offices of the court being closed, and there being no one to receive the case. The appellant lodged the case on Wednesday, that is, he did all that it was practicable for him to do. I think we should strain the statute, if we gave it the construction contended for by Mr. Mc. Mohan, which might be productive of very inconvenient results. This does not interfere with the principle that the parties themselves cannot extend the time by their own acts. Here all that was possible was done and I think that is sufficient.

The Kerala judgment states:

According to counsel for the appellant what we have before us is a condition precedent; there was an extinction of the right; and he cited in support of his contention *The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar*, . That decision has nothing to do with a case like this where neither the right nor the remedy can be considered as extinguished because the non-filing of the suit stemmed not from any act or omission of the appellant but from the fact that the court was in recess; and all that he could do, namely, the filing of the plaint on the date on which the court reopened, was done by him.

11. We do not propose to multiply the authorities on the point. We state here without hesitation that the period no doubt will always be one year and shall not be extended with the aid of section 4 of the Limitation Act or in any provisions of the General Clauses Act, a case like this, where the rule is the discharge of liability and thus extinction of the right and not a bar to

the claim as in the Limitation Act, but that one year shall be the year ending with the opening of the court after recess or a holiday if the calendar year ends during recess or a holiday. The learned trial Judge has rightly rejected the contention that the suit was not maintainable as it has been presented after the expiry of the period of one year aforementioned as it was filed on the day the Court reopened to receive the plaint.

12. Adverting to the merits of the case, we however, find that a fresh look at the evidence on the record is necessary. We are conscious of the law

that if two view are possible and the one taken by the trial court is not unreasonable, the Court of appeal shall not interfere. Yet, we propose to do

so because there are materials on the record which show that the learned Trial Judge has omitted to take into consideration such facts and

evidence which show that the carrier perhaps, was not at fault at least in delivering 27 parcels at Madras, or at least 24 which were landed at

Madras on 14-6-1974. It is the case of the plaintiff that out of 627 parcels, there were no markings at all on 24 to them, while the markings on 3

parcels were ""H.S.L. Bombay"". Exhibit P.1 which is the Bill of Lading, has a clause which says:

General Immunities:- The Shipowners are not responsible for damage, injury and/or loss arising from or occasioned directly or indirectly by the Act

of God, the King's enemies, perils of the sea, rivers, canals and navigation of any kind, pirates, robbers or thieves by land or sea, arrests or

restraints of Princes, Rulers or Peoples, restrictions or consequences of quarantine, riots, strikes, lock-outs or other labour disturbances,

combinations of workmen or others, where ashore or afloat or civil commotion or any circumstances beyond the ship-owners' control insufficiency

of packing or packages. Wear and tear of packages through Handling, inaccuracies, obliteration or absence of marks, numbers, address or

description of goods shipped, boilers machinery, rust, vermin, breakage, leakage, sullage hook-holes, chafage, seating, evaporation, or decay,

injurious effect of other goods, effects of climate or heat of holes, chemical action, fumigation, spray, rain, snow, frost, steam, coal or coal dust,

risk of craft or transshipment, or storage, afloat or on land, fire or water on board, . . .

Ex.P.1 shows under the column ""marks and Nos.

H S L

Madras

Made in GDR

No. 1117

In the column "Number and kind of packages: description of goods" the entry is 36 parcels. The learned Trial Judge has taken notice, however of

the importance of these markings saying "The importance of these" markings lies on the fact that without "those markings, it will not be possible for

all concerned to correctly identify the goods. The markings that are necessary to identify the goods are known as leading marks." He has even

quoted from Carver's Carriage by Sea (Twelfth Edition, Vol. II page 1092) which explains "Leading Marks" thus:

The term "Leading marks" means marks necessary to the correct identification of the goods. It may include quality marks where the actual goods

that a consignee is to receive cannot be identified except by reference to such marks.

13. Mr. Sampath Kumar, learned Counsel for the appellant has not denied the responsibility of a carrier upon them and acknowledged that if there

was any loss or short landing, the appellant shall be liable. He has, however, submitted that the learned trial Judge has completely overlooked the

fact that the defendant, appellant readily accepted the liability for the short delivery/no delivery of 9 packets, that there was none but the plaintiff

alone who was competent to import steel sheets, marks and Nos. HSL Madras made in GDR/A/T. No 1117 doubt were noted in the Bill of

Lading, but there were many circumstances under which there could either by obliteration of marks or mistake in marking by those who handled

the parcels. He has accordingly contended that so long 24 parcels delivered at Madras were identifiable as goods meant for delivery to the

plaintiff, the latter's refusing to honour the consignment merely because H.S.L. Madras made in G.D.R. A/T. No. 1117 on the package was not

seen, was not justified. It is a case, according to Mr. Sampath Kumar, in which 24 parcels belonging to the plaintiff were delivered at Madras, but

without verifying whether they were goods to the specification and quality, plaintiff's agent refused to honour the consignment. The learned trial

Judge, according to Mr. Samapath Kumar, has on the one hand taken notice of

some of the clauses of the agreement as shown in the Bill of

Lading, but ignored the most vital one referred to above. According to him, since the fact that 36 parcels with marks and numbers H.S.L. Madras

made in GDR A/T 1117 were booked and carried in the ship by the appellant was not in dispute, it was expected that all the 36 parcels arrived

with marks and numbers as shown in the Bill of Lading. But if it was not so, nonetheless 24 parcels were landed on 8-6-74 which were identifiable

as parcels of the consignment to the plaintiff-respondent, its agent had no justification to refuse to take delivery under the pretext that there were no

marks and numbers as H.S.L. Madras made in G.D.R. A/T 1117 on the parcels. According to Mr. Sampath Kumar delivery depended upon

identification of the goods and not marks on the parcels or packages which could suffer obliteration or even be a case of genuine omission on the

part of the shipper who alone was responsible to affix the marks and numbers.

14. The learned trial Judge has referred to Ex.D.2 plan which showed that parcels intended for the plaintiff were stowed in one batch and that the

hatch was opened only after the ship was berthed in Madras Port and also that the ship did not carry any other parcel of steel for any other

consignment. He has also referred to Ex.P.5, import tally sheet, issued by the Port Trust under S.39(3) of the Madras Port Trust Act, which

showed the, 14 bundles had all marks; 1 bundle had marking "HSL Bombay" and 6 bundles ""HSL or nil"" markings. He has also referred to the

evidence to D.W.1 who was working Chief Officer in the ship at the relevant period and who has stated the suit parcels were stowed in hatch No.

2 and apart from the suit parcels, the ship did not carry steel to any other consignee. In his evidence D.W.1 admitted that he did not look into the

Bill of Lading at the time when the goods were loaded but stated that it was his duty to verify whether the marks were as per the Bill of Lading

which he said he did with reference to the manifest and has stated that, he was not aware what the markings were there at the time when the goods

were landed in Madras.

The learned trial judge has also referred to the evidence of P.W.2, the Shed Master in the Madras Port Trust. He has stated that it was his

responsibility to check up the nature of the cargo and ensure the safe handling and securing correct delivery to the concerned importer. He has

stated in his evidence that the checking was done with reference to the Bill of Lading and other documents such as delivery order. According to him, the marks borne on the package should tally with the marks borne on the import application. Marking was usually done by way of tag or stencilling on the packages. The tag is fastened so that it cannot be detached easily. In his evidence he has stated, the learned judge has also noticed, that there will be individual stencilling on the cargo and that he had issued Ex.P4.B Certificate, stating that 36 parcels had not been launched. The most important evidence, however, from him is the unmanifested cargo for discharge at the Madras Port was treated as excess landed and 24 packages which had no marks or numbers were shown as excess landed at the first discharge at the Madras Port. Learned trial Judge has referred to the evidence of D.W.2, the Head Clerk in the Import Department of Ananthakrishna and Company, agents of the defendant, who deposed that as per Ex.P.1 the Bill of Lading, 36 bundles with marks HSL Madras made in G.D.R. A/T No. 1117 were entrusted by the sellers to the shippers and that only 24 parcels were landed in the first instance, 3 parcels were overcarried to Calcutta and brought back and 9 parcels were not found. He also admitted that in 24 parcels there were no markings and in 3 parcels the markings were HSL Bombay, that the Port Trust issued B. Certificate because the markings in the parcels were not in conformity with the manifest and that because in the 24 parcels that were sought to be delivered to the plaintiff there were no markings, the plaintiff could not identify the same. Learned trial Judge has referred to Ex.P.18, the survey report, Ex.P.6 the letter sent by the defendant's agent Ananthakrishna and Company to the plaintiff on 25.7.1974, Ex.P.7, plaintiffs reply stating that since the goods could not be identified as theirs, they were not bound to take delivery against the short landings and, therefore, they returned the delivery order; Ex.P.8 the letter dated 1st August, 1974 from Ananthakrishna and Company to the plaintiff wherein they state that the three parcels landed at Madras Port as per Tally Receipt No. 6102/2 dated 17.7.1974 bore marks HSL Madras, 2 bundles and the ship did not carry any consignment of steelsheets for Madras other than the plaintiffs consignment, and other correspondence between the parties such as Exhibits P.17, P.20 and P.23 and concluded that the defendant failed to deliver 36 parcels of steel intended for the plaintiff carried

by the vessel ""S.S. Indian Tribune

15. Before we enter into our consideration of the main contention of the learned Counsel for the appellants, we may here refer to some of the

authorities which speak of the legal relationship between the shipowner, consignee and the consignor. In the Trustees of the Port of Madras by its

Chairman K.P.V. Shaik Mohamed Rowther and Co. 1963 2 S.C.R. (Suppl.) 915 it is stated:

There is no doubt the ship-owner is the bailee of the shipper, the consignor, and that he is responsible for the delivery of the goods to the

consignee or transferee according to the terms or the bill of lading. This duty the ship owner discharges only when he has delivered the goods to

the consignee or such person who may be entitled to take delivery in accordance with the endorsements on the bill of lading. Delivery to the Board

is not delivery to the consignee or person both because the delivery is to be on the presentation of the bill of lading and because the Act contains

no provision which would constitute the Board an agent of the consignee for the purpose of taking delivery of the goods. It is true that on the

Board's taking charge of the goods and giving receipt about it to the shipowner, the master or the owner of the vessel is absolved from liability for

any loss or damage which may occur to the goods which had been landed but this provision by itself does not sufficiently convert the receiving of

the goods by the Board after they had been landed by the shipowner to the board's making delivery of the goods on behalf of the consignee. It is

clear therefore that when the Board takes charge of the goods from the ship-owner, the ship-owner is the bailor and the Board is the bailee and

the Board's responsibility for the goods hereafter is that of a bailee. The Board does not get the goods for the consignee. . .

In the very same judgment it has been pointed out;

The responsibility of the carrier for the goods does not cease merely by the technical discharge of the goods from the ship but continues upto his

delivery in accordance with the terms of the bill of lading.

16. In Madras Port Trust vs Annumalai ILR (1966) 1, Mad 164 a passage in Halsbury's Laws of England (third edition, Volume XXXV, Page

450 has been quoted thus;

The ship-owner remains liable under his contract until he has made delivery to a

person entitled thereto. A delivery to a Wharfinger or to a dock

authority is not, in itself, sufficient unless the contract provides for such delivery or, unless there is a custom to the effect.

Thereafter it has been observed:

Ordinarily, it is the ship owner's duty to get the cargo out of the holds and to deliver it to the consignee, while it is the duty of the consignee to take

delivery of it. The extent of their respective obligations in any particular case is, in the absence of any Special contract, regulated by the custom, if

any, of the Port of discharge. Under the decision of the Supreme Court above referred to, delivery which a consignee is entitled to is shifted from

the side of, the ship to the warehouses where the Board stores the goods till the consignee appears to take delivery. The quay is considered to be

a part of the ship. If that be the real position, the tally sheets become matters of internal checking between the ship-owner and the Port Trust, as

bailor and bailee, and the consignee is not concerned with the correctness of the same. If the quay is also a part of the ship and the Port Trust is

only a bailee bound to deliver according to the bill of lading, it would be no answer to contend that the delivery can only be according to the Tally

sheets and not according to the bill of lading the delivery being against the bill of lading.

17. We are not required to refer to many other decisions on the subject, as from the authority of the Supreme Court and the Division Bench of this

Court two principles clearly emerge:

(1) The responsibility of the carrier for the goods does not cease merely by the technical discharge of the goods from the ship, but continues upto

their delivery in accordance with the terms of the bill of lading; and

(2) Ordinarily it is the ship-owner's duty to get the cargo out of the holds and to deliver it to the consignee, while it is the duty of the consignee to

take delivery of it. The extent of their respective obligations in any particular case is, in the absence of any special contract regulated by the

customs, if any, of the Port of discharge.

It is needless to emphasize that while the ship-owner is duty bound to deliver the cargo to the consignee in accordance with the bill of lading, and

the consignee is duty bound to take delivery of it, the extent of their respective obligations have to be regulated by the contract, and in the absence

of the contract, by the customs. We have extracted from the Bill of Lading one of the terms of the contract and underlined the relevant portion

thereof to show that there would be no liability to the ship-owner if for circumstances beyond the ship-owner's control, there is any damage, injury

or loss to the cargo and ""insufficiency of packing or packages, wear and tear of packages through handling, inaccuracies, obliteration or absence of

marks, numbers, address or description of goods shipped. . ."" So far 24 bundles were found without any shipping marks. Therefore, it was

necessary to advert to the contract between the parties and then to decide whether merely for the reason of insufficiency of packing or packages,

wear and tear of packages through handling, inaccuracies, obliteration or absence of marks, numbers, address or description of goods, shipper

would be held liable for damages or not. Learned trial judge has not averted to this aspect of the case at all. He, it seems, has been guided mainly

by the importance of the term ""leading marks"" attached for the purpose of identification of the goods and certain statements in this regard in the

Indian Carriage of Goods by Sea Act and Carver's Carriage by Sea (Volume 2, 12th Edition, Page 1092). He has, however, quoted but failed to

appreciate the principle in *Parsons v. New Zealand Shipping Co.*, 1901 I.A.C. 548 in which it is said:

The ship will not be responsible for correct delivery unless such package is distinctly, correctly, and permanently marked with a mark and number

and address.

18. Here we may refer to the evidence. D.W.1 who was at the relevant time the Chief Officer of the Ship, has stated in his deposition that the

entire cargo was stored in Hatch No. 2 (forward Part). He had prepared the cargo plan (Ex.D 2) and he also stated that apart from what has been

stated in the cargo manifest (Ex.D 2) there could be no other cargo in the Hatch No. 2. In answer to one of the specific questions ""Did you carry

any other similar steel sheets in bundles"" he has replied ""No. Other than Madras no other steel sheets to any other place"" and to yet another

question ""Even to Madras was there any steel bundle to be delivered to any other party other than HSL"", he has replied ""No"". When he was asked

Did you verify all the 36 bundles in this case"", he has replied ""No. We usually verify only in samples, that is one or two , and when asked ""In this

case how many of them you have examined", he has answered "Two or three. Since it was mentioned as HSL and intended for Madras and it was

mentioned in the cargo manifest we took it for granted that it is only for Madras. I do not look in details." He was also asked "Did you verify

whether the markings were as per the bill of lading?" he has replied "No. Because the bill of lading is given at the time of sailing".

19. Facts which come to be proved and in appears there can be no other inference, are:

(1) The only person at the relevant time entitled to import steel was the Hindustan Steel Limited (Steel Authority of India, the plaintiff);

(2) The only cargo in Hatch No. 2 Forward Part, was steel meant for delivery to HSL, that is to say, the plaintiff;

(3) 24 bundles of steel which has no identification marks or number on the packages were delivered at Madras Port on 8.6.1974;

(4) 3 bundles marked HSL Bombay A/T 1117 were first overcarried to Calcutta and subsequently landed at Madras on the return of the vessel

from Calcutta on 8.7.1974.

Bill of Lading is important. It is the document showing the number, nature, description, etc. of the cargo. Defendant as the carrier, was bound to

account for every item mentioned in the Bill of Lading and to deliver to the consignee goods according to the Bill. But both the consignor and the

consignee on the one hand, and the carrier on the other were bound by the terms and conditions of the agreement which included as quoted above,

a condition that the carrier would not be liable for damage, injury or loss arising from or occasioned directly or indirectly by insufficiency of packing

or packages, wear and tear of packages through handling, inaccuracies, obliteration or absence of marks, numbers, address or description of

goods shipped. If there were doubts about the 24 parcels which had no markings or numbers, the consignee was required to verify and reject if

goods did not answer the description and standard of the order. Plaintiff knew that there were 24 parcels delivered at Madras Port on 8.6.1974

which were shown to have been excess landed. Plaintiff was expected to be aware of the above condition of the contract and before refusing to

take delivery thus ascertained whether they were landed for delivery to the plaintiff or not.

20. Plaintiffs agent P.W.1, it appears, became hypertechnical to the extent of the obstinacy in saying that 27 bundles he refused to acknowledge as

belonging to HSL because, they did not contain any of the identification marks. What has alarmed us in particular is his attempt to suggest that

there were other consignments of steel in the same vessel meant for Calcutta and Bombay. Learned counsel for the respondent has not been able

to show any material, evidence or circumstance to hold that even remotely there could be any other consignee of the steel sheets than the plaintiff.

If there were no shortages found at Bombay or Calcutta, if in fact there were any materials brought to Bombay and Calcutta as stated by P.W.1,

why attempt was not made to locate at least the bundles for carriage to Calcutta although they had identification marks for delivery at Bombay Port

and when they were delivered at Madras they were either identified as goods for delivery at Bombay or goods for delivery at Madras. P.W.1 has

himself admitted that any steel sheets whether for this contract or not, landing from any vessel in any India Port whether they bore any mark or not,

could be imported only by "HSL". To a specific question ""You agree with me that any steel sheet whether for this contract or not that has been

landed from a vessel in any Indian Port, whether it bears any mark or not could be imported only by HSL. Am I right?"" , his answer is ""yes"". Thus

in the absence of anything to the contrary on the record, it is irresistible that 27 parcels of steel delivered at Madras port were meant for "HSL"

and it had no valid reason to refuse its acceptance. No damages can thus be allowed for its not accepting these 27 parcels particularly because

under the terms of contract, the carrier had the immunity for the absence of marks, numbers etc.

21. One more contention is required to be considered. The learned trial judge has held that under the Gold Clause Agreement, the plaintiff will be

entitled to the value of the packages at Rs. 3,731.30 per package. At this rate, the value of 36 packages will come to Rs. 1,34,326.80. He has

accordingly decreed the suit for the said amount for the alleged non-delivery of 36 parcels of steel sheets. It was the defendant appellant who

submitted that the liabilities of the defendant should be restricted to $\frac{1}{2}$ 100 sterling per package or German D.M. 1250 per package. According

to the defendant, the equivalent rupee value of $\frac{1}{2}$ 100 sterling as on the date of discharge was Rs. 1,865.65. Plaintiffs counsel accepted the value

equivalent to ₹½ 100 sterling as on the date of discharge at Rs. 1,865.65. He submitted, however, that under Clause (2) of the Gold Clause

Agreement, the ship owner's liability in respect of any claim should be limited to ₹½ 200 sterling. The learned trial judge has quoted Clause (2) of

the Gold Clause Agreement which is to the effect:

The ship owner's liability (whether contested or not) in respect of any such claim shall be limited to ₹½ 200 sterling lawful money of the United

Kingdom per package or unit of cargo (unless the nature and value of such cargo have been declared by the shipper before loading and inserted in

the bill of lading) notwithstanding that some other monetary limit is laid down by the Legislation to which the contract of carriage is subject.

22. In the case in hand, the bill of lading limited the liability to ₹½ 100 sterling per package. D.W.2 admitted that the defendant is a party to the

Gold Cause Agreement. On that basis the learned trial Judge has said:

If that is so, the plaintiff will be entitled to take advantage of the Gold Clause Agreement notwithstanding the fact that the liability is limited to ₹½

100 sterling per package, because clause (3) of the Gold Clause Agreement provides thus:

Further the ship owners agree that, where the law or the port of shipment or discharge requires that the relevant bill or lading shall be subject to

local Hague Rules legislation, it shall be deemed to be subject to the Hague Rules as modified by this Agreement, whether such Legislation be

expressly incorporated in the bill or not.

Learned counsel for the appellant has, however, drawn our attention to Paragraph 6 of the agreement, viz., Gold Clause Agreement which reads:

It is appreciated that, while the parties to this agreement will use their best endeavours to ensure that all the claims with which the agreement is

designed to deal are dealt with in accordance with its terms, there may be cases in which Shipowners or Underwriters may be obliged to become

parties to proceedings outside the United Kingdom; in such cases the provisions of this Agreement shall not apply to such proceedings.

Based upon this his argument is that the learned trial Judge has committed error in acting beyond the contracted rate as per the bill of lading and

granting a rate based on the Gold Clause Agreement. A Division Bench of the Kerala High Court in Hajee Abdul Kareem Hajee Hussain and

Abdul Kadhira Syed Mohammed vs M/s. The Great Eastern Shipping Company Ltd., Bombay A.S. No. 41 of 1957 considered a case of a bale

shortdelivered by S.S. Jag Ganga from Bombay to Cochin. The bill of Lading specified the rate. The trial court however, restricted the award on

the basis of the provision embodied in Article IV, Rule 5 of the Schedule to the Indian Carriage of Goods by Sea Act, 1925. The relevant portion

of Article IV, Rule 5 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 100 $\frac{1}{2}$ 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.

23. In the instant case also there has been no declaration about the nature and value of the goods by the shipper before shipment and inserted in

the Bill of Lading. Before the Kerala Court the common ground was that the nature and value of the goods had not been declared by the shipper

before the shipment and inserted in the Bill of Lading, and that if Article IV, Rule 5 stood by itself the maximum amount recoverable from the

respondent would be $\frac{1}{2}$ 100 and that the said sum in Indian currency would amount only to Rs. 1,331-4-0, the amount awarded by the trial

court. The appellant, however, before the Kerala Court contended that the provision has to be interpreted in the light of Article IX of the Schedule

which reads:

The monetary units mentioned in the Rules are to be taken to be gold value.

24. The Kerala Court has adverted to various authorities are quoted a passage from the Carriage of Goods by Sea, 9th Edition Page 205, that

reads:

The construction of this article is difficult. The only reference to a monetary unit in the Rules is contained in Art. IV Rule 5 where reference is made

to a maximum liability of $\frac{1}{2}$ 100. If any effect is to be given to the present Article, it would seem that $\frac{1}{2}$ 100 must be constructed as $\frac{1}{2}$ 100

Gold, that is to say, the current market value (presumably at the date of breach) of the gold content of a hundred sovereigns of the weight and

fineness specified under the Coinage Act, 1870. In as much as Art IV, Rule 5 deals with the Measure of the carriers liability and not with the mode

or discharging that liability, this is probably the construction which would be adopted by the English Courts." (Charter parties and Bills of Lading,

16th Edition, Page 496). Carver says that the construction of the Article is "very difficult" and that where it is necessary to compute the equivalent

of $\frac{1}{2}$ 100 in a currency other than that of the United Kingdom as in the case before us the courts of this country can give judgment only in terms

of Indian Currency Article IX clearly requires the amount of the foreign currency which would be equal in value to 100 Gold sovereigns to be

computed.

Other Sovereigns, it appears, have chosen to modify the law and establish that monetary units mentioned in these rules are to be taken to be lawful

money of the respective sovereigns. But even in England, Halsbury dealing with the construction of reference to Foreign currency and to gold

generally, has stated:

Where a debt is expressed in terms of a foreign currency, the reference to that currency may indicate the mode in which the debts is to be

discharged or the means by which the amount of the debt is to be measured or both.

The Kerala High Court has said:

Article IX is very much like the gold clause in international contracts which are intended as pointed out by Lord Maugham in (1939) 2 All ER 184

) to afford a definite standard or measure of value, and thus protect against a depreciation of the currency and discharged of the obligations by

payment of lesser value than that prescribed.

There is no prohibition of such a clause in this country, as for example, in Canada by the Gold Clauses Act, 1937, section 6 of which provides:

Every gold clause obligation is hereby declared to be contrary to public policy and no such provision shall hereafter be contained in, or made in

respect of, any obligation.

The Court accordingly decreed strictly in accordance with Article IX aforementioned. Gold Clause agreement of Hague Rules as they are called,

are incorporated in the Indian Carriage of Goods by Sea Act, 1925. So long as there is no change in the law it is difficult to allow any party to the

agreement to escape the liability under the Gold Clause obligation.

25. We are, for the stated reason, in complete agreement with the law laid down by the Kerala High Court. In the result, the appeal is allowed in so far as damages calculated for alleged non-delivery of 27 parcels are concerned. The decree of the trial court, however, is affirmed with respect to non-delivery of 9 parcels. There shall be no costs in appeal. It is obvious that the decree of the trial court with respect to costs also shall be proportionately reduced in terms of the decree for damages. An oral prayer for the issue of a certificate under Art. 133(1) of the Constitution has been made. Since we have decided this case mainly on a consideration of facts, we do not find any question of law involved which requires a decision by the Supreme Court. Therefore, the prayer for certificate is accordingly rejected.