

(1963) 02 CAL CK 0023
In the Calcutta High Court
Case No : Suit No. 1205 of 1958

Jagdishprasad Pannalal and Co.

APPELLANT

Vs

India Steamship Co. Ltd.

RESPONDENT

Date of Decision : 25-02-1963

Acts Referred:

Contract Act, 1872 — Section 73

Citation : AIR 1963 Cal 510

Hon'ble Judges : A.N. Ray, J

Bench : Single Bench

Judgement

A.N. Ray, J.—The plaintiff instituted this suit for the recovery of Rs. 3,52,542-0 and in the alternative an enquiry into damages and decree for the sum found so due. By three bills of lading numbered 31, 32 and 39 all dated August 5, 1957 the defendant company acknowledged shipments by the plaintiff of 360 drums of groundnut oil to be safely and securely carried by the defendant company to the Port of Calcutta. On August 16, 1957 the steam-ship arrived at the Port of Calcutta. The defendant company delivered 348 drums and failed and neglected to deliver the balance quantity of 12 drums. The plaintiff claims a sum of Rs. 3,52,512-0 being proportionate invoice price of the said 12 drums."

2. The defendant alleged in the written statement that the said drums were carried on terms as will appear from the endorsements on the bills of lading. The endorsements relied on by the defendant are set out in paragraph 3 of the written statement. The defendant denies any breach of contract. The defendant contends that if any portion of the goods were not delivered, the defendant has no liability in respect of non-delivery or loss or damage by reason of the agreement between the parties.

3. The following issues were framed at the trial.

(1) What was the quantity of goods alleged to have been delivered to the plaintiff?

(2) What was the value of the goods alleged to have been not delivered to the plaintiff ?

(3) Is the defendant at all liable for the alleged nondelivery in view of the agreement under which the said goods under the bills of lading Nos. 31, 32 and 39 dated 5th August, 1957 were carried?

(4) To what relief, if any, is the plaintiff entitled?

4. On behalf of the plaintiff there is the verbal evidence of Amritlal and Sakti Bhusan Chakravorty. On behalf of the defendant there is the verbal evidence of Kali Kinkar Mukherji. Amritlal is in the employment of Indo Malayan Trading Company. Indo Malayan Trading Co. used to send groundnut oil to the plaintiff. Amritlal used to look after the general management and he supervised the entire work. He stated that he went to the harbour and booked 360 drums of groundnut oil in respect of the three bills of lading. He also proved the weight lists in respect of the consignments. The weight lists were prepared by a person called Sankar who was an assistant to Amritlal. Amritlal stated that the goods were weighed in the presence of the witness and the weight list was also prepared in his presence. Amritlal stated that he deposited the weightment lists and Hundis in the Bank of Bikaner. The Hundis were signed by Popat Lal Gobardhandas Shah. Popatlal Gobardhandas Shah signed as manager of Jagdishprasad Pannalal and Company, Madras. The Hundis were in favour of Jagdishprasad Fannala and Company, Calcutta. The amounts under the Hundies were to be paid to the order of Indo Malayan Trading Company. The Hundis were endorsed by Indo Malayan Trading Company. The endorsement was signed by P. G. Shah. Amritlal stated that he deposited the documents, viz., Bill of Lading, invoices, weight list and Hundis with the Bank because Indo Malayan Trading Co. had an account with the Bank of Bikaner. In order to have facility in getting the money deposited in respect of the Hundis and Bill of Lading, all the documents were deposited with the Bank of Bikaner. Amritlal stated that the particulars mentioned in the invoices were correct. The Hundis as well as the Invoices were tendered. Amritlal referred to the Rokar Book and the Cash Book for the relevant period. He stated that 60 drums of groundnut oil were purchased from K. Gopalan Chettia and Sons, 23 Drums from S. A. Ahmed Badruddin Co. Oil Mills, another 25 drums from the same company of S. A. Ahmed Badruddin Co. Oil Mills, another 14 drums were purchased from S. A. Ahmed Badruddin Co. Oil Mills and 25 drums were purchased from C. R. Oil Mills. Amritlal also spoke of the purchase of 40 drums from Muthualgunanda Oil Mills Co. In this fashion the witness referred to the purchase of all the 360 drums. The witness proved the prices paid in respect thereof. All the entries were tendered. The witness further stated that the goods were purchased at the prevailing market price.

5. Sakti Bhusan Chakravorty is employed by Jagdishprasad Pannalal and Co. He stated that the weight lists were received from Indo Malayan Trading Co. He stated that 347 drums were received from the defendant. The defendant wanted to deliver one drum which the plaintiff refused on the ground that the drum was

empty. The sale value of the groundnuts contained in the drums was given by Sakti Bhusan Chakravorty at Rs. 5/- or Rs. 7/ per maund higher than the rate quoted in the Invoices. He stated that the plaintiff suffered loss to the tune of Rs. 3,500/-.

6. On this evidence counsel for the defendant contended that the plaintiff did not prove damages in respect of 12 drums. The second contention on behalf of the defendant was that the defendant had no liability by reason of the agreement.

7. I shall first deal with the question of liability under the agreement. The Bills of Lading contained, inter alia, the following endorsements :

"On deck at shippers" risk. Steamer not responsible for damage or leakage. Carried on deck without liability for loss or damage howsoever arising whether due to the negligence of the carrier, his master, servants or agents or otherwise."

8. Clause (2) of the Bill of Lading is as follows : "Carrier shall not be responsible for any loss or detention or damage to the goods howsoever caused (whether by unseaworthiness or unfitness of the vessel or of any other vessel, tender, lighter or craft at any time whatsoever or otherwise howsoever).

(a) In the case of goods other than live animals or cargo which in this bill of lading is stated as being carried on deck and is so carried, at any time before they are received at the vessel's rail at the port of loading or after having passed the provisions of this clause the goods would be the responsibility of the carrier."

9. The verbal evidence on behalf of the defendant was adduced by Kali Kinkar Mukherji. He has been in the employment of the defendant since the month of August, 1957. The bills of lading are all dated August 5, 1957. Kali Kinkar Mukherji stated that 360 drums were shipped. He stated that 347 drums were delivered and one drum was landed in the shed and for the remaining 12 drums the defendant received a claim from the claimant, the liability of which was repudiated on the ground as set forth in the bill of lading. He was asked as to what happened to the 12 drums. His answer in Q. 9 was as follows: " I am not aware of that; it was lost."

in cross-examination he was asked as to what he meant by that. Kali Kinkar Mukherji's answer in Q. 15 was as follows :

"I personally am not aware of the facts; but I am aware from the records that it was lost; that is why I told you that I am not aware; I was not in the spot."

He admitted that he had no personal knowledge. I am unable to hold that there is any loss of the goods. No records have been produced to show the alleged loss. It was not pleaded that the goods were lost.

10. Counsel for the defendant contended that nondelivery would amount to loss. He relied on a decision in British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, . That was a case where 44 bags were alleged by the steamer company as not being traceable and therefore

short delivered. The only question there was whether the defendant in that case had any liability. Reliance was placed on the decision in *Great Western Rly. v. Wills* (1917) AC 148, and it was held in the Madras case following the decision in *Great Western Railway* case that non-delivery would amount to loss. In the present I case the mere contention of non-delivery on the Evidence does not, in my opinion, amount to any loss.

11. The decision of the House of Lords is not referred to in Carver's Carriage of Goods by Sea. I should state here that counsel for both parties stated before me that the Carriers Act did not apply and the Carriage of Goods by Sea Act would also not apply by reason of the special agreement between the parties. The notation on the bills of lading to the effect, "On deck at shippers" risk" or "Steamer not responsible for damage or leakage" or "carried on deck without liability for loss or damage howsoever arising whether due to the negligence of the carrier, his master, servants or agents or otherwise" do not in my opinion protect the defendant in the present case. These clauses do not have the effect of relieving the steamer company from liability for non-delivery. The decisions on clauses relieving the Railway Company from liability are not usually a reliable guide to the meaning of the words in the bills of lading. The contract as embodied in Clause (2) in the bills of lading relieves the shipping company for loss or detention or damage to the goods howsoever caused (whether by unseaworthiness or unfitness of the vessel or of any other vessel, tender, lighter or craft at any time whatsoever or otherwise howsoever). Counsel for the plaintiff contended that the words in the contracts would show that loss, detention or damage to the goods howsoever caused by unseaworthiness or unfitness of the vessel or of any other vessel whatsoever or otherwise howsoever would have to be construed ejusdem generis and in such a case unseaworthiness or unfitness of the vessel or otherwise would protect loss or detention or damage to the goods. There is considerable force in that contention. As I have already indicated I am unable to hold that there is any proof of loss of the goods in the present case. The goods have not been delivered. The clauses relieving the companies from their liabilities are usually construed contra proferentem. It is manifest that the relieving effect of such clauses will extend only to the tenor and purport of the words actually used.

12. In the *Great Western Railway* case (1917) AC 148 it was held on the terms and conditions of carriage that non-delivery of a consignment meant there non-delivery of the consignment as a whole. Viscount Haldane drew a distinction between the user of the words "consignment" and "goods" in the terms of that case and observed that non-delivery of consignment in that case contemplated not loss of items but of the entirety. In the present case no distinction can be drawn between partial or insufficient delivery and total non-delivery. In the House of Lords case the variation of language in the several alternatives in the protective clause was held significant.

13. I am of opinion that non-delivery in the present case does not protect the

shipping company from responsibility or liability and the shipping company is not relieved from liability in respect of non-delivery of 12 drums. Before I leave this part of the case I should refer to the decision in Home Insurance Co. Ltd. and Another Vs. Ramnath and Co., Madras, on which counsel for the plaintiff relied. In that case 9 drums were shipped at Bombay for Madras on deck at the shipper's risk. Goods were not traced at Madras nor could the shipping company account for the total loss. In a suit by the consignee, the shipping company claimed to be absolved from the liability by the saving clause. It was held that there was no evidence to show that the company took all the care and caution that was reasonably expected of a man of ordinary prudence in respect of similar goods. It was held that the clause in the bill did not imply that in cases of total loss or non-delivery of the entire goods there was a total exemption from liability of the carriers. The term "shippers' risk" would only mean such loss and such damage that might arise consequent upon the goods being put on the deck which would have to be proved by the shipping company. In other words the loss had to be related to the goods being shipped on the deck and in absence of such evidence the shipping company would be held liable for the value of the goods. The decision in British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, was referred to and was distinguished on the nature of the clause in British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, . The clause in British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, was as follows :

"Notwithstanding anything to the contrary herein contained live animals and/or deck cargo are received, kept and carried at the sole risk of the owner thereof, and neither the carrier (which expression includes both the owner of the ship and the operating ship owner for the time being) nor any stevedores, wharfinger nor any agent or servant of any of them nor any other person whomsoever for whom the carrier may be responsible shall be under any liability whatever for the goods, nor for any loss or expense connected therewith however caused and whether due to negligence unseaworthiness or otherwise. Shipper and all concerned are, therefore, advised to see that their insurance policies cover all and every risk whatsoever whether ashore or afloat and are made without recourse to the carrier or any of the parties aforementioned."

It is manifest that in British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, the words relieving liability were that the company was not put under any liability whatever for the goods nor for any loss or expense connected therewith howsoever caused whether due to negligence, unseaworthiness or otherwise. The words under "any liability whatever for the goods" had a special aspect and significance in British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, . The clause in the present case does not in my opinion have the same effect as in British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait by agent K.A. Hariganga Ram, .

14. As to the contention of counsel for the defendant that the plaintiff had not proved damages, I am satisfied on the evidence that the value of the goods consigned has proved.

15. Counsel for the defendant relied on the recent decision of the Supreme Court in *Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another*, . It was held there that damages in case of breach of contract are calculated with reference to market rate on the date of breach for similar goods, and that relevant market rate in that case was held to be Kanpur because the delivery was put through railway receipt for Calcutta F. O. R. Kanpur. Counsel for the defendant relied on this decision in support of the contention that there was no evidence of market rate. The evidence adduced by the plaintiff in this case is in my opinion sufficient that the goods were purchased at the prevalent market rates. That evidence has not in my opinion been impeached. Counsel for the plaintiff relied on the decision of the Judicial Committee in *A. V. Joseph v. R. Shew Bux*, reported in 23 CWN 601 : (AIR 1918 PC 149), in support of the proposition that the evidence in the present case was such that it would entitle the plaintiff to ask for damages in respect of 12 drums on the basis of the lowest price and lowest weight of the drums. In other words minimum weight and minimum value was claimed in respect of 12 drums. On that basis counsel for the plaintiff calculated that damages would amount to Rs. 3042.88 nP. It is always open to the plaintiff to reduce the figure claimed in the plaint. The greater includes the smaller. Counsel for the plaintiff also relied on the statement of Law in Halsbury's Laws of England Vol. 35, p. 476, paragraph 678 in support of his contentions. For all these reasons, I am of opinion that the plaintiff is entitled to succeed. There will, therefore, be a decree for Rs. 3042.88 nP. The plaintiff is entitled to interest on Judgment at 6 per cent and costs.