
(1971) 05 KL CK 0002
In the High Court Of Kerala
Case No : C.R.P. No. 1213 of 1970

Joc Lopez

APPELLANT

Vs

American Export Co.,

RESPONDENT

Date of Decision : 24-05-1971

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Article 3

Citation : (1971) KLJ 625

Hon'ble Judges : K. Sadasivan, J

Bench : Single Bench

Advocate : S. Narayanan Poti, for the Appellant; S.K. Brahmanandan, for the Respondent

Judgement

K. Sadasivan, J.—The plaintiff, proprietor of M/s. Maxwell & Co., Chittoor Road, Ernakulam, is the revision petitioner. He instituted a suit for recovery of the sum of Rs. 29,254-85 Ps., and interest from the defendants. The suit arose under the following circumstances:- A consignment of tin plates was shipped for the plaintiff in the ship belonging to the 1st defendant under a clean bill of lading, to deliver at Cochin 15 skids of tin plates of gross weight 39100 lbs. in the same condition in which the commodity was entrusted to them at New York. Originally the goods were sent through s.s. "Ex. Minister" (Flying Club); but contrary to the terms and conditions of shipment, the goods were transhipped at Colombo through another ship s.s. "Azumasan Maru". According to the plaintiff the goods were damaged even at the time of transhipment at Colombo due to negligence and misfeasance of 1st defendant and their employees and agents. The ship s.s. "Azumasan Maru" arrived at Cochin Port on or about 1-9-67. The plaintiff authorised their agents to take delivery of the goods; but the consignment was unascertainable as the tin plates were completely loose, rusty and damaged and mixed up with other tin plates of other consignees. The claim bill was submitted to defendants 1 and 2 on 6-11-67. The 2nd defendant conducted the survey at Port Quay side on 9-5-68 and at the plaintiff's godown on 4-6-68. The survey disclosed that the consignment was landed with less weight of 4.349 metric tons

of tin plates and that the tin plates weighting 11.182 metric tons were rusty and damaged and only 1.932 metric tons of tin plates were in sound condition. Only at the time of survey the goods of the plaintiff could be ascertained and surveyed. Accordingly the delivery could be given only on 9-5-68.

The defendants contended inter alia "that the claim is barred by limitation and that the plaintiff has no cause of action against them. According to them the goods were discharged in the Cochin Port on or about 2nd to 7th September, 1967 and as the claim has been brought beyond one year from that date, it is barred. The learned Subordinate Judge took up the question of limitation as a preliminary issue and has held by his order dated 21st July, 1970 that the plaintiff claim is time barred. Under clause (3) of para 6 of Art. III of the Indian Carriage of Goods by Sea Act, 1925, the period of limitation is one year from the date of delivery of goods or the date when the goods should have been delivered. According to the learned Judge, the suit having been filed more than one year after the ship left the port and after the submission of the claim, the cause of action has extinguished and the suit is accordingly barred. The plaintiff would maintain that limitation can run only from the date of delivery and as the goods were unidentifiable delivery was possible only after the survey which took place on 9-5-68. The period of one year expired on 9-5-69; but as the vacation intervened, the suit was filed only on the re-opening date, viz., on 24-5-69. Thus the suit is within time. 2. The question for consideration is whether for purposes of limitation the date to be taken into consideration is the date on which delivery was effected or the date on which the goods should have been delivered. This would take us to the further question whether the case on hand is one of short delivery as distinguished from the entire failure to deliver. In the case of the former, limitation would run from the date of delivery, while in the latter limitation will run from the date when the goods should have been delivered. Clause (3) of para 6 of Art. III of the Schedule to the Indian Carriage of Goods by Sea Act, 1925 (hereinafter referred to as the Clause) reads as follows:--

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

Interpreting this clause a Division Bench of this court in *State of Kerala v. Malabar Steamship Co.* (1970 KLT 343) has observed:--

With respect we take the view that the clause provides only one starting point in respect of each of the two causes of action, the date when the goods should have been delivered in the case of loss, and the delivery of the goods in the case of damage. To arrive at its true meaning the clause has to be read *reddendo singula singulis* (giving each to each), and, when so read, what it says is,

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

have been delivered in the case of loss.

What has been delivered could only have been damaged, not lost. And the date when the goods should have been delivered marks the birth of a cause of action for loss, not for damage.....

Turning next to the second of the two causes of action namely, damage, it is equally obvious that damage can come to light, and a claim made in respect thereof only after the goods have been delivered, not until then. There can be no such claim when the goods have not been delivered--there can only be a claim for loss--and the date when the goods should have been delivered can have no bearing on such a claim. Therefore, it is clear that so far as damage is concerned, only the first of the two starting points, namely, "the delivery of the goods," not the second namely, "the date when the goods should have been delivered" can apply.

The learned Subordinate Judge after referring to the above ruling has observed:-

In the subsequent ruling reported in 1970 KLT 343 where it was held that cause of action for the damages will start only after the goods have been delivered. In this case compensation is claimed for portion of the consignment not delivered, i.e., short delivered and also for damages as portion of the goods became rusty and damaged on account of the alleged negligence of the shipping company. But when the ship leaves the port after discharge, the goods even if it is in the custody of the port authority, should be deemed to have been delivered to the consignees. It is settled law that the port authorities hold goods on behalf of the consignees.

But according to the plaintiff the cause of action for damages can accrue only on delivery of the goods and delivery in the present case was effected only on 9-5-1968 In para 9 of the plaint the claim has been formulated in the following way :-

As per the law governing the bill of lading and or otherwise, the defendants as Sea Carriers owed a statutory duty to the plaintiff to load, store, carry, keep and to take diligent care of the said consignments while in transit and to deliver the said goods in the same good condition of quality and quantity to the consignee at the port of destination. The defendants have failed in the discharge of the statutory and contractual duty by committing the short landing by weight and damage to the goods and the defendants are liable to the plaintiff in damages which is limited to the actual loss of Rs. 29254.85.....

Damages are thus claimed for the damage or injury caused to the goods and such a claim can be put forward only after the goods have been delivered. The question then is as to when could it be said that the goods were delivered; was it when the ship left the port as has been held by the learned Subordinate judge or when actual delivery was effected after survey and ascertainment of the goods as claimed by the plaintiff. In the present case the ship left the Port on 7-9-67;

but the goods were ascertained by survey conducted by the 2nd defendant on behalf of the 1st defendant on 9-5-68 at Port Quay Side and on 4-6-68 at the plaintiff's godown. Earlier than 9-5-68 it was impossible for the plaintiff to take delivery of the goods as the goods were unidentifiably mixed up with the goods due to other consignees.

The shipowner must separate the goods so as to give delivery to the several consignees. It is not ordinarily good delivery to tender goods of two consignees claiming different marks mixed up together and to leave the consignees to sort them. (1930-1 K.B. 83, 93 quoted by Carver on British Shipping laws p. 1008).

So long as the shipowner continues to hold the goods as carrier, he is answerable for their safety to the extent imposed on him by the contract of carriage. The mere fact that the goods are at their intended destination and not in course of transit, but in the carrier's ware house is not sufficient to change his responsibility to that of a warehousemen simply. (vide Carver on British Shipping Laws, P. 1023).

It was held in *Hong Kong Banking Corporation v. Baker* (1870-7 Bomb H. C. Rep. 186) that:-

goods landed by the master at the custom house wharf, and set apart there for the consignee, were still in the possession of the master as carrier after a reasonable time for taking delivery had elapsed.

The point, therefore, is that until the goods are ascertained and made deliverable to the consignee, the carrier would continue to hold himself responsible for the safety of the goods and liability if at all can be fastened on the consignee only if he refuses to take delivery of the goods even after the goods were rendered deliverable.

The duty of the carrier under the contract of carriage is to carry the goods by a particular ship and then to deliver the same on the arrival of the ship at the port. The manner in which the delivery will take place will depend on the particular terms of the bill of lading and on the custom of the port of destination. 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. (vide *The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar*,).

This duty cast upon the carrier was not discharged when the ship left the port. That was discharged only after the ascertainment of the goods by survey and delivery on 9-5-68. In 1930-1 K.B. 83 (cited supra), the shipowners issued bills of lading relating to the carriage of certain timber from a Baltic port to Garston Dock, Liverpool. The bills of lading incorporated clause 15 of the Chamber of Commerce Baltic Wood Charter, 1926, under which, in the events which happened, the ship-owner's liability was to cease at the port of discharge when

the cargo was discharged into a wagon within reach of the shore crane tackle, and for any work done by the shipowners beyond delivering within reach of the shore crane tackle the consignees were to pay. Garston Dock is owned by a railway company who by their own servants do all the work of discharging vessels in the dock by means of their shore cranes, loading the cargo in wagons and conveying it to their depot where they sort it according to its marks and ultimately deliver it to its owners; and they apportion the cost of doing this work between shipowners and receivers. Purporting to act in accordance with this practice, the railway company charged the shipowners with the expenses of taking hold of the bundles of timber as these were slung over the wagons by the shore crane, of guiding the bundles into position in the wagons, and of unloosing the slings. The shipowners paid these charges under protest and claimed to recover the amount contending that they were properly attributable to the receivers of the cargo. The court held upon the construction of the charter party, that the shipowners were properly charged with the expenses aforesaid. In *Frank Stewart Sandeman & Sons v. Tyzack and Branfoot Steamship Co.* (1913 A.C. 680), bales of jute consigned to various consignees and specifically marked were shipped under bills of lading stating that the bales were received "marked and numbered as per margin", that the number of packages signed for was to be binding on the shipowner unless error or fraud be proved, but that the ship was not to be liable for "obliteration or absence of marks." On the discharge of the ship fourteen bales were missing and eleven bales, forming part of the cargo shipped at the port of loading, were not marked as labelled in the bills of lading and could not be identified as belonging to any particular consignment. All the consignees received their full consignments except four, who refused to accept any of the eleven bales. In an action for freight by the shipowner against one of the four consignees, who had received six bales less than his full consignment, the consignee, counter claimed for shortage. The shipowner was willing to account to the four consignees for the value of the fourteen missing bales in proportion to their respective shortages, but claimed that the eleven bales ought to be allocated amongst them in the like proportion. It was held that "as the ship owner had failed to deliver the full number of bales shipped, he was not entitled to claim that the non-delivery of any of the six bales was due to obliteration or absence of marks, and that he was liable for the full value of the six bales." It was further held that "the shipowner's duty was to deliver the goods entrusted to them for carriage, and they do not perform that duty if all that the consignee obtained is a right to claim as tenant in common a mixture of those goods with the goods of other people". So also in the present case the goods were mixed up with goods belonging to other consignees and it was left to the consignees to select their goods which was an impossible task without a survey and before ascertainment of the goods by survey it could not be said that delivery was effected. By mere throwing in the port or warehouse the goods in a confused mass, the duty of the carrier is not discharged. In *Haji Shakoore v. Volkart Brothers* (A.I.R. 1937 Sind 11), the learned Judges held that the port trust can be treated as agents of the ship-owners in the case of unidentified and

unascertained consignments; but not in respect of identified and ascertained consignments. The learned judges observed :-

The case of this court, 11 S.L.R. 29, has been cited to us as authority for the statement that the port trust act as agents of the shipowners. It may well be that in the particular circumstances of that case the decision, was an entirely right and proper decision for in that case there was a mixture of cargo and a confusion of marks and the instructions of the shipowners were necessary before the different bales of the consignments could be identified and ascertained and delivered to the consignees. While it may well be that the port trust were the agents of the shipowners for the limited purpose, we cannot hold, as we have been asked to hold here, that the port trust were the agents of the shipowners to hold identified and ascertained consignments indefinitely at the will of the consignees.

Thus in case where the cargo is mixed up and the various marks confused the duty of the shipowner continues to identify and ascertain the goods of the particular consignees and effect delivery. That took place in the present case only on 9-5-68, and, therefore, limitation for purposes of clause (3) of para 6 of Art. III can run only from that date. In para 2 of the plaint the plaintiff had made the clear allegation that "all the goods were properly and securely and suitably export-packed in accordance with the custom of the trade and that the consignment was shipped from New York properly labelled and marked with Aid emblem and marking requirements in accordance with regulations. Para 4 of the written statement which purports to be in answer to the above averment of para 2 of the plaint is significantly silent regarding the packing and marking of the goods. The plaint averment in that regard, therefore, stands, and from that it has to be concluded that delivery became impossible before survey and ascertainment. Limitation therefore, can run only from 9-5-68 and in this view, the suit is within time. The finding of the court below on issues 1 and 2 is hence set aside and the issues are found in favour of the plaintiff. The suit is, therefore, remitted to the court below for trial and disposal of the rest of the issues according to law.