

(1913) 05 MAD CK 0002
In the Madras High Court

Kariadan Kumber

APPELLANT

Vs

The British India Steam Navigation Company Limited, by
Agents Aspinwall and Co.

RESPONDENT

Date of Decision : 02-05-1913

Acts Referred:

Contract Act, 1872 — Section 28

Citation : (1915) ILR (Mad) 941 : 20 Ind. Cas. 546 : (1913) 25 MLJ 162

Hon'ble Judges : Tyabji, J;Sadasiva Aiyar, J

Bench : Full Bench

Judgement

Sadasiva Aiyar, J.—Though my learned brother has prepared a separate "judgment dealing fully with the facts and the law, I thought that I

should add a judgment of my own as the questions raised are important and as I am differing from the conclusions arrived at by the majority of the

Full Bench in Sheik Mahomed Ravuther v. The British India Steam Navigation Co. Ltd. ILR (1908) M. 95. The defendant in this case is the

powerful company well known as the British India Steam Navigation Co. The legal questions we have to consider are: --

(a) whether they are common carriers,

(b) whether the English common law relating to carriers by sea applies to them or the provisions of the Indian Contract Act relating to bailees,

(c) if the English common law applies to them, whether the defendants are wholly absolved from liability for the loss caused by the negligence of

their agents employed to carry in boats the goods of the plaintiff (consignee) from the mooring place of the steamer to the plaintiff's jetty in the port

of Cochin, owing to the defendants" having protected themselves from liability from such loss by appropriate clauses in the Bill of Lading.

(d) whether those general clauses could not legally absolve the defendants because the Bill of Lading did not contain an express provision declaring that defendants shall not be liable even if the boats procured by their agents to take the cargo from the steamer to the plaintiff's jetty were unseaworthy.

2. As regards the first question, the case of *Hajee Ismail Sait v. The Company of the Messageries Maritimes of France* ILR (1905) M. 400 clearly

decides that carriers by sea for hire are common carriers. The Carriers Act, 1865, does not, however, apply to them, as in that Act the term

common carriers"" is confined to denoting ""a person other than the Government engaged in transporting for hire property...by land or inland

navigation"" and is not extended to carriers by sea. The next question is ""are common carriers by sea governed by the English Common Law or by

the Contract Act ?"" In the Full Bench case of *Sheik Mahomad Ravuther v. The British India Steam Navigation Co. Ltd.* ILR (1908) M. 95 the

learned Chief Justice and Wallis J. evidently hold as unquestionable that, where the English Common Law and the Indian Contract Act differ, the

former and not the latter applied to common carriers by sea. Wallis, J. referred (at page 108) to the argument of the appellant's learned vakil in

that case, (Mr., now Mr. Justice, Sundara Iyer) that Section 28 of the Indian Contract Act applied and that the clause in the Bill of Lading

absolving the carriers by sea (the same British India Steam Navigation Co., who is the defendant in this case) from all liability arising from whatever

cause, is opposed to public policy and hence is void u/s 23 of the Indian Contract Act. The learned Judge, however, did not accept this argument

of the learned vakil and says at page 109 "" As regards the second point, I am of opinion that it is not open to us to hold that contracts exempting a

carrier from liability for the negligence of his servants are void as opposed to public policy. As pointed out by Walton, J., in *Price and Co v. Union*

Lighthouse Co. (1903) I.K.B. 750 the law of England, unlike the law of the United States of America, does not forbid the carrier to exempt himself

by contract from liability for the negligence of himself and his servants; but if the carrier desires so to exempt himself, it requires that he shall do so

in express, plain and unambiguous terms." So far as the general question goes, this is the law which has been received and applied by the Indian

Courts, (Jellicoe v. The British India Steam Navigation Company ILR (1884) C. 489 and Hajee Ismail Sait v. The Company of the Messageries

Maritimes of France ILR (1905) M. 400. Contracts have been made and business has been carried on for many years in India on this footing, and

if the law is to be altered now it must be by the legislature." White C. J. says on this point at page 107 " Mr. Sundara Aiyar contended that a

contract which purported to relieve a ship, owner from his liability as a carrier for negligence was contrary to public policy and should not be

enforced. As pointed out by Walton J., in Price & Co., v. Union Lighterage Company (1903) I.K.B. 750 the law of the United States of America

forbids a carrier to exempt himself by contract from liability for negligence whilst the law of England does not. I am of opinion that on a question of

this character courts in India ought to follow the law of England." Mri Seshagiri Aiyar who argued the present appeal before us, contended that

White C. J. and Wallis J. did not, in their judgments in Sheik Mahomed Bavuthar v. The British India Steam Navigation Co. Ltd. ILR (1908) M.

95 consider the question whether the Indian Contract Act applied or not, but I am unable to accept this argument. It is no doubt true that Sankarun

Nair J. in that case elaborately considered the provisions of the Contract Act, which he assumed to be applicable to common carriers by sea even

when such provisions conflicted with the English common law (see page 121.). Mr. Seshagiri Aiyar invited us to refer this question to a Full Bench,

as, though White C.J. and Sankaran Nair J. agreed in their ultimate conclusion in that case, they differed on this question of the applicability of the

provisions of the Indian Contract Act and the agreement between the views of the Chief Justice and Wallis J. about the non-applicability of the

provisions of the Contract Act did not affect the result of that case, as the learned Chief Justice differed from Wallis J. also as to the result of

applying the English Common Law. As I am myself always inclined not to travel beyond Indian cases and Indian Statutes unless I am convinced

that they are clearly not applicable, I would have gladly referred the question of the applicability of the Contract Act, where it differs from the

English Common Law, to a Full Bench, if I did not feel that I am concluded by the pronouncement of the Privy Council on this question. In The

Irrawady Flotilla Company v. Bugwandas ILR (1891) C. 620 their Lordships have clearly approved of the decision of the Full Bench in Moothora

Kant Shaw v. The India General Steam Navigation Co. I.L.R. (1883) C. 166 and disapproved of the contrary decision in Kwoerji Tuhidas v. The

Great Indian Peninsula Railway Company ILR (1878) B. 109. The effect of their Lordships' decision in The Irrawady Flotilla Company v.

Bagwandas ILR (1891) C. 620. seems to me to be "" that the duties and liabilities of a common carrier are governed in India by the principles of

the English Common Law on that subject"" (except where they have been departed from in the case of some classes of common carriers by the

Carriers Act of 1865 or by the Railway Acts of 1878 and 1890) and "" that notwithstanding some general expressions in the chapter on Bailments,

a common carrier's responsibility is not within the Indian Contract Act of 1872.

3. Taking it, then, that the- English Common Law applies to the rights and liabilities of the defendant company, the Bill of Lading (Exhibit B B.) in

this case contains, the following two clauses;

1. accidents, loss or damages from any act, neglect or default whatsoever of the pilot...or other servants of the company excepted and the

company is to be at liberty to tranship the goods either on shore or afloat and reship or forward the same at the company's expense but at

shipper's or consignee's risk.

2. In all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackle and

thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee.

4. As regards these very wide clauses, White C.J. and Sankaran Nair J. held in Sheik Mahomad Ravuther v. The British India Steam Navigation

Co., Ltd. ILR (1908) M. 95 that they did not absolve the company from liability for loss occasioned by the negligence of their servants before

delivery and after landing. Wallis J. held otherwise. (I might remark that Sir S. Subramania Aiyar J. and Miller J. similarly differed in the earlier

stage of the same case, reported in Sheik Mahomad Ravuther v. The British India Steam Navigation Co., Ltd ILR (1906) M. 79. I am bound, of

course, by the judgment of the majority unless it is opposed to a judgment of the Privy Council, not brought to the notice of the majority, or

reported after the Full Bench decision. Such a judgment of the Privy Council, it seems to me, has been pronounced in Chartered Bank of India,

Australia and China v. British India Steam Navigation Co. Ltd. (1909) A.C. 369. The defendant in that case was this very same British India

Steam Navigation Co. The bill of lading which had to be construed in that case contained this very same clause about the liability of the company

ceasing absolutely when the goods were free of the ship's tackle &c., and the defendants' landing agents (as in this case) received the goods into

lighters to be carried to jetties. The only difference between the facts of this case and the facts of that case is that, whereas the goods were lost in

the present case through the negligent overloading of the lighter by the defendants' landing agents, the goods were lost in the other case by the

misfeasance and fraud of the landing agents. Their Lordships of the Privy Council applied the English Common Law relating to common carriers by

sea in that case as we have to do in this case. I shall just quote the concluding sentences of their Lordships' judgment:--"" Now it may be conceded

that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and

it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute

dominion and control of the consignees. But their Lordships cannot think that there is any ambiguity in the clause providing for cesser of liability. It

seems to be perfectly clear. There is no reason why it should not be held operative and effectual in the present case. They agree with the learned

Chief Justice that it affords complete protection to the respondent company."" It seems to me that this decision of the Privy Council pronounced on

the 31st March 1909 (about 31/2 months after the pronouncement of the Full Bench decision in *Sheik Muhanad Ravuther v. The British India*

Steam Navigation Co., Ltd. ILR (1908) M. 95. on the 15th December 1908,) clearly over-rules the decision in the latter case, unless we are to

accede to the ingenious argument of Mr. Seshagiri Iyer that we are not bound by the decision of the Privy Council unless it was given in a case

which went up on appeal from an Indian tribunal. (The appeal case of 1909 was an appeal from the decision of the Supreme Court of the Straits

Settlements). I am wholly unable to hold that the binding nature of a decision of the Privy Council depends on the locality of the tribunal which

pronounced the decision from which the appeal was preferred to the Privy Council, any more than the binding nature of a decision of this Madras

High Court upon a Madras District Court depends on the question whether the High Court's decision was pronounced in an appeal preferred in a

case which arose in that particular district. (The tribunal which decided the case in *Chartered Bank of India Australia and China v. British India*

Steam Navigation Co., Ltd. (1909) A.C. 369. consisted of Lord Macnaughten Lord Atkinson Lord Collins and Sir Arthur Wilson who have taken

part in deciding many Indian appeals). The last question I have to consider is whether this case can be distinguished from the case decided by the

Privy Council by reason of the fact that the boat in which the goods were placed by the defendant's landing agent was unseaworthy. Having regard

to the language of their Lordships of the Privy Council that the clause in the bill of lading absolutely absolving the defendant as soon as the goods

are free of the ship's tackle protects the defendant from liability for whatever happens afterwards, I do not think the question whether what

happened afterwards was negligent overloading by, or fraudulent dishonesty of, the landing agents is of the least importance. If it is necessary to

decide this question, I should be inclined to follow the English Law on this question also, whatever may be the American Law. (See, as to the

American Law, *Carver's Carriage by Sea*, Section 251(a), last paragraph). *Arnould on Marine Insurance* (Vol II) says. "" The Warranty of

seaworthiness which is implied as to the ship does not extend to lighters employed to land the cargo. It is enough to satisfy this warranty (of

seaworthiness) that the ship be originally seaworthy for the voyage insured when she sails on it; the assured makes no warranty that the ship shall

continue seaworthy in the course of it"" "" Every ship"" says Lord Mansfield "" must be seaworthy when she first sails on the voyage insured but she

need not continue so throughout the voyage"" (*Arnould* in footnote (b) at p. 848 refers to the cases decided by Lord Mansfield and Lord Eldon

establishing the above proposition).

5. In *Lane v. Nixon* ILR (1866) C.P. 412 it was clearly held by Erle C.J. Byles J. Keating J, and Montagu Smith J. that the warranty of the ship's

seaworthiness does not extend to lighters employed to land goods. Keating J, says, ""the employment of lighters to land the goods seems to be a

usual and ordinary incident of such a voyage, and has no reference whatever to the implied warranty of seaworthiness. I think it would be a

dangerous step to extend that warranty"". Montagu Smith J. said"" There is nothing to justify the extension of the implied warranty of seaworthiness

to lighters so employed as in a fresh stage of the voyage. It would, I think, be extremely inconvenient if it could be done."" If there is no implied

warranty of seaworthiness for lighters and boats (or catamarans or coolies or elephants, as Erle C.J. put it) the clause about negligence in the bill of

lading is "" express, plain and unambiguous"" and clearly exempts the defendants from liability, even if we adopt the "" artificial rule of construction

(as Wallis, J., puts it at page 109 in Sheik Muhamad Ravuther v. The British India Steam Navigation Co., Ltd ILR (1908) M. 95 ""enunciated by

Walton, J"", in Price and Co. v. Union Lighterage Company (1903) I.K.B. 750.

6. Mr. Seshagiri Aiyar quoted several English cases relating to the question whether, when the safety of the goods was insured till landing, the

assurer is liable:

(a) in the case when the boat which goes to the ship's side for landing belongs to some person other than the owner of the goods and the goods

are lost before landing.

(b) in the case when the said boat belongs to the owner of the goods and hence delivery to him may be said to be complete though the goods are

not then actually landed.

7. I think these cases whether belonging to class (a) or class (b) have little relevancy as they are concerned with the question whether delivery into

the owner's boat is equivalent to landing so as to terminate the assurer's liability and not to the question of the shipowner's liability when the

shipowner has protected himself from all liability after the goods have left the ship's tackle. (I may however, state that I find it difficult to accept the

decision in Sparrow v. Carruthers (1801) 2. Strange 1236 as correct and the correctness of that decision has been, a in manner, doubted in Hurry

v. Royal Exchange Assurance Co. (1801) 126 ER 1367. For all these reasons I would dismiss the second appeal with costs.

Tyabji, J.

8. The question to be determined in this appeal is whether or not the respondent shipowners are liable to the plaintiff for the loss of the goods

mentioned in the bill of lading Exhibit BB. The goods were lost by the sinking of the boats in which they were put after being taken out of the ship;

the cause of the sinking was that the boats were overloaded, The shipowners claim to be protected by the following clause in the bill of lading. In

all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon

the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." This clause in itself seems to be sufficiently clear

and unambiguous to save the shipowners from any liability after the goods are free of the ship's tackle; and it is admitted that the loss occurred

after they were so free. The point does not seem to arise here whether, when the cause of loss is such as we have to deal with, the liability imposed

by law upon the shipowners can be limited only by an express and specific stipulation referring in direct terms to the cause of the loss or whether

general words limiting the liability will suffice provided their terms are wide enough clearly and unequivocally to include the cause of loss in

question; because in the clause before us the liability of the shipowners is limited by reference to a point of time, after which the shipowners are no

more responsible for the loss of the goods. It is not contended that any doubt arises, with reference to the facts of the present case, as to the point

of time when the clause must come into operation having been reached when the loss occurred, nor is it questioned that after the clause comes into

operation its terms in their natural meaning remove all responsibility from the shoulders of the shipowners. The rules of law and construction which

prevail when the clause is so framed as to limit the liability of the shipowners against particular causes of damage by providing exceptions to the

general responsibility of the shipowners, which general responsibility is to survive subject to the excepted cases, can have but a remote bearing

where the clause is so framed as to purport to leave no responsibility whatever on the shipowners after a particular point of time has been reached,

after which it is stipulated in effect that the voyage must be taken to have been completed so far as the responsibility of the shipowners is

concerned, In the first mentioned clauses the cases in which the shipowners are saved from liability consist of exceptions to the general rule; in the

latter the relative functions of the rule and the exception are interchanged.

9. It seems, however, necessary to refer to two decisions which were cited to us. The shipowners rely on *The Chartered Bank of India, Australia*

and *China v. British India Steam Navigation Company, Limited* (1909) A.O. 369. where their Lordships of the Privy Council had to determine the

liability of the same shipowners, who are the present respondents, under a clause in identical terms. The cause of the loss there was that the goods

has been taken away without their production of the bill of lading or delivery order through the fraud of the representatives of a third party acting in

collusion with the representatives of the landing agents of the shipowners.

10. The arguments before us were, first, that the present case is distinguishable from the decision of the Privy Council above referred to inasmuch

as the cause of the loss in the present case, it was contended, falls under the denomination of the unseaworthiness of the boats, and that though the

clause in question must (in accordance with the said decision of the Privy Council) be taken to be sufficient to protect the shipowners against the

fraud of their agents, it is not sufficient to protect them against the unseaworthiness of the boats in which the goods are placed when they are taken

out of the ship in order to be carried to the jetties.

11. Assuming that the overloading of the boats could, in such circumstances as we have before us, be considered to render the boats

unseaworthy-and that assumption requires us to apply the word "" unseaworthy"" in a rather unusual sense--there is nothing to prevent the

shipowners from limiting their liability against the unseaworthiness of the ships, any more than there is anything to prevent their limiting their liability

against the fraud of their agents. The principle in the one case seems to have features common with the principle in the other case. In the case of

unseaworthiness, it is assumed that the parties enter into the contract on the basis that the carriers are in a position to carry the goods and that their

ships are capable of doing so--to use the words of¹ Lord Blackburn in *Steel v. State Line Steamship Company* (1877) 3 A.C. 72 there is a duty

on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the

ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for

sea carriage, that is what is properly called a "" warranty,"" not merely that they should do their best to make the ship fit, but that the ship should

really be fit."" If, therefore the shipowners wish to enter into a contract in which

they do not warrant that their ships are seaworthy, they must make it clear to the persons with whom they contract that they do not so warrant; similarly the carriers would, ordinarily, be supposed to be responsible for the honesty of their agents who are under their own control, and if they wish to restrict their liability so that they are not responsible for loss caused by the dishonesty or the fraud of their agents, equally must they make that restriction plain. It seems, however, unnecessary in this case to consider whether the duty cast, upon the shipowners to employ honest agents and the duty (if any) cast upon the shipowners to prevent loss arising, from the causes with which we have now to deal, are each, or either of them a warranty properly so called or whether the duty in either of the cases consists merely in that the shipowners should do their best to prevent loss. We have primarily to deal with the words of the clause and the facts of this case; and not much help is obtained in construing a clause by the circuitous method of reasoning which has to be followed before any aid can be had from the fact that the Privy Council considered a similar clause to save the shipowners from liability in the particular case before them. For if we wish to follow this method of reasoning we should have to determine the further questions whether the liability under the circumstances which were before the Privy Council is of the same extent and nature as the liability under the facts now before us, and in order to do so, it will be necessary to determine whether the cause of loss with which we are dealing falls under the head of unseaworthiness.

12. It has, however, seemed necessary to refer to the Privy Council decision, as it was been pointed out to us that in *Sheik Mahomed Rowthar v.*

The British India Steam Navigation Company Limited I.L.R (1708) M. 95 bench consisting of the Chief Justice, Wallis and Sankaran Nair. JJ.

held that a clause in the same terms as the one that is before us did not protect the shipowners against loss by sweat damage through the neglect of

the shipowners after the goods were free of the ship's tackle. That case is not a decision of a Full Bench of this court, and Mr. Justice Wallis

dissented from the view taken by the other two judges. On the other hand we are of opinion that we are bound by the decision of the Privy

Council so far as that decision is applicable, notwithstanding that it was not pronounced in appeal from an Indian Court.

13. The next head of argument before us was that the clause in question is of no effect inasmuch as the Indian Contract Act, section, 151, lays

down the liability of bailees in express terms and that it does not permit the parties to contract themselves out of such liability: Section 151 does not

contain the words "" in the absence of special contract "" as the next section does, and as are contained in a great number of other sections of the

Contract Act-not less than 25, as the learned pleader for the appellant pointed out to us. In *Sheik Mahomed Rowther v. The British India Steam*

Navigation Company Limited ILR (1708) M. 95 to which reference has already been made, Mr. Justice Sankaran Nair expressed the view that

the term " bailee" in Section 151 of the Indian Contract Act must be taken also to refer to carriers. But that view was not alluded to and,

apparently, not accepted by the other Judges composing the bench. Assuming that the clause we have to deal with does not end the relationship of

the ship-owners as carriers of the goods after the goods are free of the ship's tackle, and that the bill of lading is not spent or exhausted until the

goods covered by it are placed under the absolute control and dominion of the consignee See *Chartered Bank v. British India Steam Navigation*

Company Limited (1909) A.C. 369. It is not open to this Court to say that the liability of such carrier as we have to deal with in this case is

governed by Section 151 of the Indian Contract Act after the decision of the Privy Council in the case of *Irrawaddy Flotilla Company v.*

Bagwandas ILR (1891) C. 620. In that case the Privy Council had to decide whether the view of the Bombay High Court as expressed in *Kuverje*

Tulsidas v. The Great Indian Peninsula Railway Company (1878) ILR 3 B. 109 was correct or the view of the Calcutta High Court in *Moothova*

Kant Shaw v. The Indian General Steam Navigation Company ILR (1883) C. 166. and they said that they were ""compelled to decide in favour of

the view of the Calcutta High Court and against that of the High Court of Bombay,"" In deciding against the view of the High Court of Bombay,

they decided against the argument on which the appellant relied. They decided that the liability of carrier such as we have to deal with is not

governed by the sections of the Indian Contract Act, relating to bailees.

14. Under these circumstances there is no reason why the plain meaning of the clause should not be given effect to, and why the shipowners should

be held to ha responsible for the loss of the goods, after the time when it was stipulated that the goods should for all purposes and in every respect

be at the risk of the shipper or consignee.

15. We therefore dismiss the appeal with costs.