

(1920) 08 MAD CK 0027
In the Madras High Court

Krishna Naik and Sons, Merchants

APPELLANT

Vs

Cayyar Irvine and Co., Ltd.

RESPONDENT

Date of Decision : 11-08-1920

Acts Referred:

Citation : AIR 1921 Mad 67 : (1921) ILR (Mad) 145 : (1921) 13 LW 273 :
(1921) 40 MLJ 57

Hon'ble Judges : Odgers, J;Ayling, J

Bench : Full Bench

Judgement

Ayling, J.—The essential facts of this case are simple. Plaintiffs are merchants of Mangalore. In September-October 1915 their English

agents shipped to them consignments of steel and soap by defendants' Steamship "Clan Mackellar". Freight was paid in advance. The "Clan

Mackellar" arrived at Bombay with the goods onboard on 3-11-1915. She was then requisitioned by the Government of India, and passed out of

the hands of the defendant's company. Defendants after some correspondence and after being requested by the plaintiffs to send the goods down

to Mangalore despatched them to that port by the S.S. "Airemoor" belonging to the B.I.S.N. Co. They were delivered to plaintiffs in February

1916 on payment of freight from Bombay to Mangalore, and sundry other charges. Plaintiffs sued to recover these charges amounting to Rs. 2,470

with interest from defendants' company.

2. Both the lower courts have agreed in dismissing plaintiffs' suit : and I think they are clearly right.

3. It is settled law that where freight in advance is paid to the shipowner, it is his absolutely and is irrecoverable under any circumstances by the

shipper of the goods : Vide Allison v. Bristol Marine Insurance Co. (1876) 1 App. cas. 209. This is not disputed by the learned vakil for

appellants. Appellants could not recover any portion of the freight already paid, if delivery of the goods were prevented by the total loss of the ship

at sea. The requisitioning of the "'Clan Mackellar '" by Government at Bombay took her out of defendant's control and put an end to the voyage

just as effectively, as if she had been torpedoed and sunk before reaching that port : and in the one case no more than in the other could the refund

have been claimed. This would be so even apart from any special terms of the bills of lading : but I agree with the Subordinate Judge, that the

requisitioning the ship is an "'Act of Rulers'" which is specially provided for in Clause 3 of the bill of lading and for which defendants are specifically

exempted from liability.

4. This being the law, I do not see how it can possibly be held that the defendants were under any obligation to forward the goods to Mangalore at

their own cost. Such a view would be inconsistent with the doctrine above referred to that they are entitled to retain the advance freight even

although the voyage is stopped by the loss of the ship and the goods never reached the consignee. Clause 4 of the bill of lading provides that the

shipowners shall have the option of transshipping the goods to another ship of their own or of a different line. But the proviso is obviously

designed to secure the shipowner in cases in which freight is not paid in advance and in which it is necessary for him to complete his contract by

delivery of the goods in order to earn his freight money. No inference of a corresponding duty seems to me to arise even in these cases. The

shipowner may elect to leave the goods where they are at an intermediate port on interruption of the voyage, and abandon his claim to freight.

However that may be, I am quite clear that no such obligation arises in cases of advance freight : and that nothing can be built on the presence of

this clause in the bills of lading. The latter are obviously printed forms intended to be applicable to either class of case : and the differentiation is

effected by a stamp bearing the words "' Freight prepaid '".

5. This seems to me to be the law as laid down by Kennedy, J. in Hanson v. Dunn (1906) 22 T L.R. 458. I would therefore dismiss this second

appeal with costs.

Odgers, J.

6. Certain goods, consigned to appellant at Mangalore were shipped by Messrs. Lever Brothers Limited and others on board the Clan Line

Steamer "Clan Mackellar" at Liverpool. The ship arrived in Bombay on 4th November, 1915 and was then requisitioned by Government. She

discharged her cargo, and the agents informed appellant in June, 1916 that the ship had been requisitioned and that the appellant should make his

own arrangements for bringing the goods forward to Mangalore. The goods eventually arrived at Mangalore on the S.S. "Airemoor", a steamer

belonging to the British India Line, whose agent refused to deliver unless the appellant paid the freight from Bombay to Mangalore by that steamer.

The appellant contended that as he had already paid the full freight from Liverpool to Mangalore to the Clan Line Company, he was not liable for

more, but to avoid further delay he paid these charges and now seeks to recover from the original carriers i.e. the Clan Line, the amount so paid.

The law to be applied is admittedly the English law. The appellant relies on the terms of the bill of lading (Exhibit A in C.R.P. No. 52 of 1918) for

his contention that the Clan Line was bound to send on the goods to Mangalore at whatever cost to themselves. He admits that the requisitioning at

Bombay was a restraint of princes and is within condition 3 of the Bill of Lading. Had the Bill of Lading stopped there, the appellant also admits he

would have had no case as the contract would be one impossible of performance and the freight having been paid in advance (of Exhibit A) each

party remained in the position he was in at the time the performance of the contract was rendered impossible; thus the shipping company would be

in such a case entitled to retain the freight already paid him and the consignee would have no remedy. See per Rowlatt, J., in *St. Enoch Shipping*

Company Limited v. Phospale Mining Company (1916) 2 K.B. 624 and per Lord Halsbury, L.C. in *Civil Service Co-operative Society, Ltd. v.*

The General Steam Navigation Company (1903) 2 K.B. 756. C. A . also *William Allison v. Bristol Marine Insurance Company* (1876) L.R. 1.

App. Case 200 . It is conceded by the learned vakils on either side that the difference lies in the fact of prepayment of freight. Once the freight is

paid, it can be retained in a case of impossibility of performance arising e.g., from any of the circumstances mentioned in condition 3 of the Bill of

Lading. If however the freight is not paid in advance, at most only a portion pro rata to the carriage actually accomplished would be recoverable.

That this is the English Law seems well established. It admittedly differs from the law of other countries and the difference, though sometimes

regretted, must be regarded as binding. Cf. *Byrne v. Schiller* (1871) L.R. 6. Ex Case 319 where (p. 324) Cockburn, C.J. observed ""We are all

agreed that the law is too firmly settled for us to depart from it, even in a court of appeal, that where freight is paid in advance, it cannot be

recovered back"" (See also Leake on Contracts, 6th edition p. 70). Mr. Ramesam for the appellant contends that this is not a case of impossibility

of performance because the parties did not stipulate that the ""Clan Mackellar"" should be the only ship to convey the goods, by virtue of the

conditions of the Bill of Lading, that shipowners and master were at liberty to tranship (see condition 4 Exhibit A in C.R.P. No. 52 of 1918.

7. The material portions are as follows: "" The shipowners and master shall have liberty as regards the whole. or any part, of the goods, and at the

risk of the owners there- of, at any time during the transit to ship or to tranship to any other vessel, or land, or store, or put into hulk, craft, or

lighter, or re-ship in the same or any other vessel, or forward by any other conveyance, whether any of these belong to the same shipowners or

not...In case the ship shall be prevented from any cause from proceeding in the ordinary course of her voyage, the shipowners have liberty to

tranship the goods to their destination by any other first class steamship.

8. He contends that this clause obliged the shipowners to tranship the goods at Bombay when the original ship the Clan Mackellar was

requisitioned there, thus distinguishing the case where the contract was "" to carry the goods in our bottom only"". *Shipton v. Thornton* 112 E.R.

1231 was a case of the kind referred to. The original ship the ""John Scott"" on a voyage from Singapore to London was obliged to put into Batavia

disabled. The master thereupon transhipped the goods in question to the ""Mountaineer"" and "" Sesostris"" and sued for the difference in freight. It

was held he was entitled to recover. Lord Denman, C.J., at p. 333 said "" it is clear that, by the contract, the shipowner (and the master as his

agent) is bound to carry the goods to their destination, if not prevented from doing so in his own ship by some event which he has not occasioned,

and over which he has no control. "" The master "" (says Abbot) in his book on Shipping, Part 3 Ch. 3 p. 241 (5th edition) ""Should always bear in mind that it is his duty to convey the cargo to the place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method."" When, however, such an event has occurred to interrupt the voyage, as above defined, and the shipowner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter there seems to be such disagreement in foreign ordinances and jurists on the point whether or no he is bound to tranship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of his enterprise by the vis major which prevents his accomplishing it in the literal terms of the undertaking."" Further at P. 335 "" It may therefore be safely taken to be either the duty or the right of the shipowner to tranship in the case above supposed; if it be the former, it must be so in virtue of his original contract; and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into with respect to the particular circumstances attending its fulfilment; on the other hand, if it be the latter, a right to the full freight seems to be implied; the master is at liberty to tranship; but for what purposes except for that of earning his full freight, at the rate agreed on ? in the case supposed, we may introduce another circumstance; let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port; There is then no question that the whole freight at the original rate must be paid; and that because the freighter prevents the master, who is able and willing, and has the right to insist on it, from fulfilling the contract on his part, and because the sending of goods to their destination in another vessel is deemed a fulfilment of the contract. If therefore, the owner of the goods be not present, and personally exercises no option, still the shipowner, in forwarding the goods, must have the same rights, and, in so doing, must be taken to exercise them with the same object in view.

9. It is to be remarked that the right of transshipment is treated as a privilege to the shipowner, or master for the purposes of enabling him to earn

his full freight by getting the goods conveyed to their destination. Further in Carver's "Carriage by Sea" 6th edition, at p. 415, the learned writer

says, "It is his (i. e., the master's) business to get the ship repaired, and to carry the cargo to its destination in her; and if that cannot be done, he

ought to tranship the goods into another vessel and forward them, if it be possible to do so, on such terms as to make it profitable to his employer

i. e. the owner; and again at p. 420 "But the shipowner is not bound to employ another vessel to complete the voyage to his own loss. If therefore,

the only terms upon which another ship can be got are such that the whole agreed freight and more will be absorbed by the expenses of

forwarding, the master is entitled, and in duty to the shipowner is bound, to abandon the voyage unless he can complete it in his own ship. And,

presumably, the same is true where the freight has been paid in advance "Cf. to the same effect Scrutton on Charter-parties and Bills of Lading

(7th edition) at p. 248, where it is stated (in foot note 2) "In Shipton v. Thornton (1838) 9 Ad. & 314 the point was much discussed whether it

was not the duty, as well as the right, of the master to tranship the goods if opportunity offered. The point was not determined, and does not seem

to have been expressly decided except by Kennedy, J. in a dictum in Hansen v. Dunn (1906) 11 Com. Cas. 100. And on general principles (See

Article 30) it would seem that there is no such duty.

10. Now Hansen v. Dunn (1906) 11 Com. Cas. 100 was the judgment of a single judge (Kennedy, J. but one of wide experience in commercial

cases. The case turned on the negligence of the shipowner in keeping the cargo on board during repairs instead of discharging and transhipping it.

The learned Judge observes "If, on the other hand, the circumstances are such that the shipowner is justified in not repairing his ship, are or such

that, even if the ship is eventually repaired, it is not, with a due regard to his own interest and the interest of the owner of the cargo, reasonably

practicable, owing either to the length of time which the repairs will take, or the perishable nature of the cargo, or to the expense involved, or all

any such reasons, that the carriage of the cargo should be completed in the ship when repaired then the shipowner is at liberty to tranship and carry

the cargo to its destination in another bottom and so earn his freight. He is not bound to employ another vessel to complete the voyage at his own

loss. "" The learned Judge goes on to say, that if the shipowner decides neither to repair nor to tranship, he ought to be diligent to inform the owner

of the cargo of these facts so that the latter may not be unnecessarily damaged.

11. From these authorities it seems to me fair to say that it is the right, but has not so far been held to be also the duty, of the shipowner or master

to tranship, and this would be the case, in my opinion, even where there is an express clause as here in the bill of lading giving the shipowners

liberty to tranship and the clause must be deemed to have been inserted for the protection of the shipowner alone. I think therefore, that the second

appeal fails on this ground.

12. I think it also fails on another ground. It is admitted by Mr. Ramesam for the appellants that if the contract was put an end to by the

requisitioning of the "" Clan Mackellar"" at Bombay, he must fail. In *Countess of Warwick S.S. Co., Ltd. v. Le Nickel Society Annonyme* (1917)

34 L.R. . 27 a case of charterparty, it was held by the Court of Appeal that the adventure was frustrated by the requisition by Government. The

charter was for not less than 12 calendar months and contained an exception of the restraint of the princes. Six months later the ship was

requisitioned by the Admiralty. In a similar case in *F.A. Tamplin Steamship Company v. Anglo American Petroleum Products Co.* (1916) I.B.

485 it was held that the commercial adventure was not frustrated inasmuch as each party was deriving in substance though not in form a substantial

part of the benefit they respectively contemplated obtaining from the enterprise and that there was nothing to prevent the charterers resuming the

control of the vessel, and completing the charter if and when the Government restored the vessel to them. This was approved by a majority of the

House of Lords in *F.A. Tamplin Steamship Co. v. Anglo American Petroleum Product Company, Ltd.* (1916) 2 App. Cases 397. In my opinion,

the case here must clearly fail under the category of which the former of the cases quoted above is an example. I think the adventure was frustrated

by the requisition at Bombay and that it was a restraint of princes (as found by the lower appellate court) and falls within condition 3 of the bill of

lading. The contract was therefore at an end in Bombay.

13. I agree with the order proposed by my learned brother.