
(1908) 03 MAD CK 0010
In the Madras High Court

K.V.S. Sheik Mahamad Ravuther		APPELLANT
	Vs	
The B.I.S.N. Co. and Others		RESPONDENT

Date of Decision : 23-03-1908

Acts Referred:

Contract Act, 1872 — Section 23

Citation : (1908) 18 MLJ 497

Hon'ble Judges : Wallis, J;Sankaran Nair, J;Arnold White, J

Bench : Full Bench

Judgement

Arnold White, Kt., C.J.—This is an appeal under Article 15 of the Letters Patent, the learned Judges before whom the case came on

second appeal having differed in opinion. The plaintiffs claim damages for the loss of 246 bags of rice out of a consignment of 4,000 bags carried

by the defendants under a bill of lading from Rangoon to Tuticorin. These 246 bags with others were destroyed by the Municipal authorities after

they had been landed, on account of their damaged condition. The plaintiffs alleged the damage was occasioned by the negligence of the

defendants or their agents.

2. The two main questions for consideration are:

(1) On the facts were the defendants negligent?

(2) If they were, are they protected by the terms of the bill of lading? The Court of first instance and the lower appellate Court held that there had

been no negligence on the part of the defendants. The two learned Judges of this Court who heard the case on second appeal were both of opinion

that the defendants had been negligent, but they differed on the question whether they were protected by the terms of their bill of lading against

liability for negligence.

3. The damage to the goods was caused by rain. The bags were landed in boats, and the District Judge finds there was no 3e" evidence that the cargo was put out of the ship during the rain, but that it began to rain while the boats were between the ship and the shore. The District Judge finds, and we must accept the finding as binding on us, as a finding of fact, that the wetting received by the bags of rice between the ship and the shore would have caused no damage if the consignees had taken delivery at once. He also finds that "" the damage (by rain) was caused on the foreshore, and the fact that the bags had to stay there a longtime was entirely due to the negligence of the consignees, for defendants did all they could to clear the cargo quickly."" I think we are bound by the finding that the defendants did all they could to clear the cargo quickly, and I deal with this question of negligence on the footing that the delay in the clearance of the goods after they had been placed on the foreshore was due to circumstances beyond the control of the defendants. The finding of the District Judge that the fact that the goods had to stay a long time on the foreshore was entirely due to the negligence of the consignees, is a finding that the delay was caused by the negligence of consignees generally, and it seems clear from the earliest finding of the Judge, "" it is impossible to say the plaintiffs were negligent,"" that this was not intended by the District Judge to be a finding of negligence on the part of the plaintiffs. In the second place the Judge appears to arrive at this finding as a necessary inference from the fact that the defendants did all they could to clear the cargo quickly. This seems to me to be a non sequitur. It does not follow that because the defendants did all they could to clear the cargo quickly, the delay in clearance was caused by the negligence of the consignees generally. Still less does it follow it was caused by the negligence of the plaintiffs. Both carriers and consignees may have done all they could in the circumstances to clear the cargo quickly. It is not suggested that the placing of the goods on the foreshore constituted delivery to the plaintiffs or that apart from the special terms of the bill of lading the defendants' liability came to an end when they deposited the goods on the foreshore. The question, therefore, is, having regard to the local conditions in connection with the landing of goods at Tuticorin and the custody of goods by carriers during the interval

between the placing of the goods on the foreshore, and the delivery to the consignees, and the season of the year (it is not denied that, at this time of the year the "" monsoon "" may set in any day), the defendants were guilty of negligence in not taking precautions to protect the goods from being damaged by rain notwithstanding the fact (as found) that they did all they could to clear them" quickly.

4. Now the facts found or admitted are these: The practice at the port of Tuticorin in connection with the landing of cargo from steamships is to

load the cargo by boats on to the pier, unsorted, and to remove it from the pier to the foreshore and sort it there according to marks. I do not think

it was suggested on behalf of the defendants according to the practice which prevails at Tuticorin, the carriers are prepared to give delivery until the

cargo landed on the pier has been sorted on the foreshore. When sorted, the goods are at the disposal of the several consignees, and if in the

present case the defendants had been able to show that the plaintiff's goods which became damaged by the rain were ready for delivery before

they became damaged and the plaintiffs were so informed, the defendants would, in my opinion, be under no liability in respect of the damaged

goods. I think since, *ex concessio*, the contract was not terminated by the deposit of the goods on the foreshore, it was for the defendants to show

the plaintiff's goods were ready for delivery at the time they were damaged and not for plaintiff to show they were not ready. In my opinion, the

case of *The Glendarroch* (1894) P. 216 on which Mr. Napier relied with reference to the question of the burden of proof is not in point.

According to the evidence of Mr. Mansfield, the representative of the local agents of the defendants, the circular, Exhibit I, was sent to the

consignees, and it is not disputed that the plaintiff amongst the other consignees received the circular in question. The circular is in these terms -

(Exhibit I). - ""The consignees of cargo per S.S. Thorn-dale from Rangoon are hereby requested to take delivery of their cargo as it is landed each

day and remove at once, as the space for landing on foreshore is very limited. Failing to take delivery at once⁵ the cargo will be on the beach at

consignees" entire risk and expense.""In my opinion this notice does not relieve the defendants from liability in the absence of evidence that the

defendants were in fact prepared to deliver the plaintiff's goods. Mr. Mansfield's evidence with reference to this was as follows: ""On the 25th

bags were stacked according to marks and ready for delivery. There are no accounts showing how many bags of each mark were sorted and stacked on a particular day. Besides the 1st plaintiff's 4,000 bags there was other cargo consigned to the plaintiffs 2 and 3. I cannot say for certain whether any of the 4,000 bags were ready for delivery on the 24th or the 25th October. Our delivery book shows that 13 bags of S.K.V. Section were delivered on the 27th October. This was the first delivery in the case of the 4,000 bag's. I cannot say if any more bags were ready for delivery on that day. I cannot say if any S.K.V.S. mark bags were ready for delivery before the 28th. The consignees cannot remove the bags before they take a delivery order from us which order is given when the cargo is ready for delivery. The delivery order could be given even before the steamer arrives. The consignees have only to show the bill of lading and apply for the delivery order. It rained very heavily on the night of the 27th October and intermittently for some days afterwards. It rained on the day. I cannot say if it rained on the nights. The steamer will not discharge cargo when it rains. If rain sets in when boats are coming with cargo the boats continue the journey. This is what happened in the case of the landing of the bags in question. We did not provide any covering for protecting the bags from rain either on the boats or on the beach. When the heavy rain came we lent to the consignees the few tarpaulins which we had"". Mr. Laporte, the former Manager of the local agents, said: ""I can't say whether the cargo of a particular consignee was ready for delivery on a particular day; on a reference to the books of our office, some cargo consigned to the plaintiffs 2 and 3 was ready for delivery between the 24th and 28th and was not taken delivery of, but I cannot give the marks of the cargo. I cannot say when the bags bearing the marks Section K. V. Section and J. K. V. Section were ready for delivery"". It is not suggested on behalf of the defendants that they took any precautions to protect the goods from the rain. The reason why they did not do so seems clear from Mr. Mansfield's evidence. He stated: ""The nature of our liability in the matter of the cargo shipped by steamer will appear from the bill of lading. ""Our liability ceases as soon as the cargo has left the steamer's slings. We are not liable for any damage that may happen to the cargo 1. after it leaves the steamer - whether in the boat or the pier of the "beach. We are not bound to cover the cargo with tarpaulin. We g never covered

cargo with tarpaulin, but have lent tarpaulins to our consignees when asked. We have not a large stock of tarpaulins. We have a few tarpaulins and

these we keep to cover our own cargo". The figures in Exhibit IV, which the learned Judge accepts, no doubt show that on October 26th, 27th,

and 28th, 190b, a very large number of bags had been landed and were ready for delivery, but the figures do not show, and Mr. Mansfield, as I

read his evidence, admitted that it could not be shown, that the plaintiffs' bags were ready for delivery at the time they were damaged by the rain.

As it is not disputed that the goods were damaged by rain after they had been deposited on the fore-shore and that no precautions were taken by

the defendants to prevent their being damaged by rain, and as in my opinion on the facts found and admitted, the defendants' liability in respect of

the goods had not come to an end at the time the goods were damaged, I am of opinion that on the facts the defendants were negligent and are

liable for the damage-to the goods.

5. Assuming this to be so, the next question for consideration is, are the defendants protected by the terms of the Bill of Lading? The general

condition in the bill of lading is as follows: "The said goods to be carried and delivered subject to the terms and conditions hereof, including those at

the foot of the bill of lading, in the like good order and condition, at the port of Tuticorin, the Act of God, the Queen's Enemies, Restraint of

Princes Rulers or peoples, restrictions of Quarantine, Prohibition, Pirates or Robbers by Sea or Land, accident", loss and damage from Vermin,

Barratry, Jettison, Collision, Fire, Accidents to or defects latent or otherwise in Hull, Tackle, Boilers, or Machinery, or their appurtenances, Steam,

and all the perils, dangers, and accidents of the Sea, Rivers, Land Carriage, and Steam Navigation of whatsoever nature and kind; and accidents,

loss or damage from any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of the Company excepted, and the

Company is to be at liberty to carry the said Goods to their Port of Destination, by the above or other Steamer or Steamers, Ship or Ships either

belonging to the Company or to other persons, and to tranship or land and store the goods either on shore or afloat, and reship and Forward the

same at the Company's expense but at Shippers' or Consignee's risk, and with liberty also, at the like risk, to deviate as abovementioned, unto

K.V.S. Mohamed Ebrahim Saheb or to his or their assigns." Amongst the conditions at the foot of the bill of lading referred to above is the

following: "The Company is to have the option of delivering these goods, or any part thereof, into receiving Ship, or landing them at the risk and

expense of the shipper or consignee, as per scale of charges to be seen at the Agents' offices, and is also to be at liberty until delivery to store the

goods or any part thereof, in receiving Ship, godown or upon any wharf, the usual charges therefor being payable by the Shipper or Consignee.

The Company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. 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 Shipper or Consignee. Fire Insurance will be covered by the Company's Agents on

application.

6. It was contended on-behalf of the appellant that the general provision in the bill of lading as to terms and conditions which purported to exempt

the defendants from liability for "any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of the Company

referred only to the neglect, or default of defendants' servants engaged in or connected with the navigation of the ship. I should not be disposed to

accept this construction of the words - See *Baerselman v. Bailey* (1895) 2 Q.B. 301. But, however this may be, it seems to me that as a matter of

construction of the bill of lading, the question of the defendants liability is governed by the terms of the special condition at the foot of the bill of

lading which refers to that stage of the adventure when the goods were free of the ship's tackle. It was not contended by Mr. Napier and, having

regard to the wording of the special condition, it could not be contended, that the putting the goods on board a receiving ship, or landing them, or

storing them, constituted delivery. The special condition clearly contemplates that the delivery is to take place, after doing these acts.

7. Now it seems to me the defendants cannot be heard to say that for the purpose of protecting themselves against negligence after the goods are

free of the ship's tackle they are entitled to pray in aid the general conditions in the body of the bill and give the go-by to the special condition

which in terms relates to the stage of the adventure when the negligence occurred. The special conditions were inserted in the bill of lading by the

defendants for their own purposes and their own protection. They contain the terms on which the defendants were prepared to carry the goods

with reference to this particular stage of the adventure and it seems to me the question of the liability of the defendants during this particular stage of

the adventure must be governed by the special conditions with reference thereto. In fact, I do not think the contrary view was seriously pressed by

Mr. Napier", and in *British India Steam Navigation Company v. Ratansi* ILR (1896) B. 184 in which, I think, it may be assumed the general

conditions in the bill of lading were the same though the report does not say so - the point does not seem to have been put forward.

8. The view which I take appears to be in accordance with the decision of the Court of Appeal in *Rathbone Brothers and Co. v. D. MacIver, Sons*

& Co. (1903) 2 K.B. 378 where the Court holding that the carriers were unable, on the facts, to claim the benefit of a special proviso relating to

unseaworthiness, the carriers were held liable notwithstanding general words in the bill of lading which exempted them in the case of injury or

default.

9. In the Bombay case to which I have referred, the suit was against the same defendants, and it would seem that the defendants have amended

this bill of lading to meet the decision in that case. The first clause of the special condition in the bill of lading in the Bombay case is the same as in

the present case, but in the bill of lading in the present case new provisions have been inserted in substitution for a provision which purported to

impose on the consignee, where the goods were stored, "all risks of fire, dacoity, vermin or otherwise. It was held by the Bombay High Court that

the words "or otherwise" could not be held to cover all possible losses. The words "in all cases and under all circumstances" in the present bill of

lading are, no doubt, as wide and as general as possible, but the reiterated use of general words does not, of course, exclude the application of the

special canons of construction which a long course of judicial decisions has held applicable to the construction of contracts which purport to relieve

a carrier from liability for negligence. The authorities were discussed by Walton J. in *Price and Co. v. Union Lighterage Company* (1903) 1 K.B.

750. In that case goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "" for any loss of or damage to goods which can be covered by insurance."" The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost. The learned Judge held that the barge owner was not protected from liability by the contract. In the course of his judgment the learned Judge observed ""....If it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases and looking only at the language used, it might very well be said that its meaning was that the defendants were to be exempt from liability for insurable losses whether caused by negligence or not. But there is, I think, a well-established rule of construction applicable to the present case. The law of England, unlike in this respect 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."" After discussing the authorities Walton J. summarises their effect in these words - ""It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants he must insert in his contract, in one form or another, something equivalent to what is well known as a negligence clause."" Now I understand a negligence clause to be a provision which, in express terms, exempts a carrier from liability for the negligence of his servants. The specific condition in the bill of lading in the present case contains no such provision. The judgment of Walton J. was affirmed by the Court of Appeal in (1904) 1. K. B. 412, Collins M.R observing in his judgment that the judgment of Walton J. puts the decision of the case upon the right principle, and stated precisely the result of the authorities.

10. In *James Nelson & Sons, Limited v. Nelson Line (Liverpool) Limited* (1907) 1 K.B. 769, Collins M. R again refers to the judgment of Walton J., as containing "" a complete and accurate exposition of the law."" In *The Pearlmoor* (1904) p. 286 Gorell Barnes J. cites a passage from the judgment of Walton J. as summarising his own view. The passage in question is with reference to the rule laid down by Lord Bowen in *Steinmain*

and Co. v. Angier Line (1891) 1 Q.B. 619, and is as follows: ""I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as assurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words"" (1903) 1. K.B. 750. In James Nelson & Sons, Limited v. Nelson Line (Liverpool) Limited (1907) 1 K.B. 796, the Court of Appeal applied the principle of Walton J's decision in a case in which the clause in the bill of lading ran "the carrier not being liable" for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance and the plaintiffs were partially covered by insurance and had been paid the insured proportion of the loss. This case was taken to the House of Lords - (1908) A.C. 16 - and the decision of the Court of Appeal was affirmed on the ground that as there was no clear and express exemption, the ship-owner was not relieved from his duty to take reasonable care. The Lord Chancellor said that if he had been obliged to affix a definite meaning to the disputed language, he would prefer the plaintiffs' construction (i.e., a construction which would not exempt the defendants from liability; but he based the judgment, in which the other learned Lords concurred, on the ground that the clause taken as a whole was "" so ill thought out and expressed that it was not possible to feel sure what the parties intend to stipulate, and the Lord Chancellor stated that he rested his opinion on the ground that the document was ambiguous. Then follows a passage in the Lord Chancellor's judgment which has to be carefully considered with reference to the judgments of the Court of Appeal in the cases to which I have referred. The passage runs thus: ""I wish to say, with the utmost respect for the arguments of counsel, I cannot agree in what I think was the contention, that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where the words have acquired a special conventional meaning, namely, what do

the words mean on a fair reading, having regard to the whole document?" (1908) A.C. 16. Now what the Lord Chancellor stated as the argument

of counsel with which he could not agree was "the contention that there is a canon of construction by which the rigour of interpretation in some

commercial documents must be proportioned to the importance of the stipulation to be construed." The principle which underlay Walton J's

judgment and which was accepted by the learned Lord Justices and by Gorell Barnes J. was much more precise and specific than the contention

of counsel before the House of Lords and described by the Lord Chancellor. The principle was that an exception in general words, not expressly

relating to negligence even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be

construed as limiting the liability of the carrier as insurer and not as relieving him from the duty of exercising reasonable skill and care, and that if

the carrier wishes to exempt himself from liability for the negligence of his servant he must insert in his contract something equivalent to a negligence

clause. I cannot help thinking that if the Lord Chancellor had intended to repudiate this principle of construction as applicable to documents when a

carrier purports to relieve himself from liability for negligence, he would have done so in express terms. It is no doubt true that the bill of lading in

the present case does not contain contradictory terms, and in a sense it is not ambiguous, but the portion of the bill of lading which deals with the

liability of the carrier at the particular stage of the adventure when the negligence occurred, is not express with reference to the question of

negligence, and this being so I do not think the carrier is protected.

11. Having regard to the way in which the earlier authorities have been considered in the more recent cases, I do not propose to discuss the

earlier cases which were cited in argument. I will merely say that as regards shipping contracts with the exception of *Taubman v. The Pacific Steam*

Navigation Company (1872) 26 L.T. 704 I know of no case in which the shipowner has been held to be protected from negligence unless the

contract protected him from negligence in express terms. It seems doubtful whether this case should now be treated as a binding authority.

Further, the contract there had reference to passengers' baggage, and it is not clear whether the shipowners were under any liability as common

carriers with regard to this baggage.

12. As in my view of the law a shipowner is not exempted from liability for negligence unless the contract which exempts him is both clear and

express, and as the contract in the present case, though it may perhaps be said to be clear, is certainly not express, I am of opinion that the

defendants are not protected by their bill of lading.

13. Two other questions remain for consideration. I can deal with them shortly. Mr. Sundara Iyer contended that a contract which purported to

relieve a shipowner 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 and Co. v. Union Lighterage Company* (1903) 1 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.

14. Mr. Sundara Aiyar raised the point that as the learned Judges who heard this case on second appeal did not differ on the question of

negligence no appeal lay under Article 15 of the Letters Patent with reference to this question. This point is covered by authority. In *Kunhunni v.*

Vallabhan (1900) 11 M.L.J. 10 it was held by a Full Bench of this Court that the limited construction contended for by Mr. Sundara Aiyar should

not be put on Article 15 of the Letters Patent.

15. I am of opinion that this appeal should be allowed with costs throughout and that if the parties cannot agree as to damages the case should go

back to the Court of first instance in order that damages may be assessed.

Wallis, J.

16. In this case the learned Judges before whom the case came on second appeal differed on the question whether the defendants were liable

under the terms of their bill of lading for loss or damage occasioned to the goods whilst in course of landing and delivery by reason of the

negligence of their servants. In the result the decree of the lower appellate Court was affirmed u/s 575, Civil Procedure Code, and the plaintiff has

now preferred this appeal u/s 15 of the Letters Patent. The lower appellate Court held that under the bill of lading the defendants were not liable

for the negligence of their servants and also found as a fact that there had not been any negligence, but both the learned Judges before whom the case came on second appeal though differing as to the liability of the defendants for negligence were of opinion that this finding must be set aside, and that the defendants were guilty of negligence. The question most argued before us was whether the defendants were liable under their bill of lading for negligence in landing the cargo, but it was also contended by the appellant that even if the bill of lading on its true construction exempted the defendants from liability for the negligence of their servants, such an exemption was opposed to public policy and void u/s 23 of the Indian Contract Act.

17. Further questions were raised as to whether in an appeal to this Court u/s 15 of the Letters Patent it was open to either party to re-open any question on which the learned Judges had agreed, and, if so, whether in the present case the learned Judges were right in setting aside the finding of the lower appellate Court that there had been no negligence.

18. As regards the third point, I am of opinion that on an appeal from a judgment of two Judges of this Court who have differed in opinion, the appeal is not confined to the point upon which the learned Judges differed and that the whole case is open on the appeal. Clause 15 provides (1) that from the judgment of a single Judge of the High Court an appeal shall lie to the High Court; (2) that from judgments of two or more Judges of the High Court, where they are equally divided and do not constitute a majority of the Court, an appeal shall also lie to the High Court; and (3) that appeals from other judgments of the High Court shall lie to the Privy Council. There is nothing in the clause to suggest that appeals under (2) are more restricted than appeals under (1) and (3). Nor is there anything in the concluding portion of Clause 36 which merely provides how a case is to be decided when the Judges before whom it is heard are equally divided in opinion, or in Clause 39 which places certain restrictions on the right of appeal to the Privy Council provided for in the third part of Clause 15. This is how, in my opinion, the case stands upon the language of the sections, and the same conclusion has been arrived at in the judgment of a Full Bench in *Kunhunni v. Srivallabhan* (1900) 11 M.L.J. 101 by which we are bound.

19. As regards the 2nd 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 Lighterage Company* (1903) 1 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 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 Co. ILR (1884) C. 498; 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.

20. The next point is, assuming the rule laid down by Walton J. to be correctly stated - and several subsequent cases were cited in which it was

approved - whether in the bill of lading the carriers have stipulated for exemption from liability in terms sufficiently express, plain and unambiguous

to satisfy the artificial rule of construction enunciated by Walton J. After stating the effect of the earlier cases Walton J. sums up by saying: "It really

comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants he must insert in his contract, in one form or

another, something equivalent to what is well-known as a negligence clause." In that case, the only evidence of the terms of the contract was a

statement at the head of the carriers' stationery that they would not be liable for any loss or damage which could be covered by insurance, and

Walton J. held that these general words would not exempt them from liability for their servants' negligence. In the present case the bill of lading

expressly excepts "accidents, loss or damage from any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of

the Company," and, to borrow the language of Mr. Scrutton in Article 91 of his book on "Charter-parties and Bills of Lading, "exceptions such as

this "unless otherwise clearly worded, limit the shipowner's liability during the whole time he is in possession of the goods as carrier, and therefore

apply during the loading and discharging of the goods.

21. The respondents, however, rely on one of the conditions at the foot of the bill in which it is stipulated that the Company is ""to have the option

of delivering the goods, into a receiving ship, or landing them at the risk and expense of the shipper or consignee, and is also to be at liberty until

delivery to store them in receiving ship, godown or upon any wharf, the usual charges therefor being payable by the shipper or consignee,"" and that

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."" The question is, do these general words

impose upon the carriers a liability for the negligence of their servants from which they would have been exempted under the express terms of the

bill but for these words. In my opinion, reading the exception with the condition, the clear intention of the parties was by these words to confer

upon the carrier as regards this particular stage of the adventure a larger degree of exemption than he had stipulated for generally as regards the

whole adventure in the exceptions. To read such general words of exemption as imposing upon the shipowner as regards this stage a liability for

negligence against which he has already stipulated generally is, in my opinion, not so much interpreting as altering the contract. The rule laid down in

the judgment of Walton J. is a rule of interpretation and there was no difficulty in applying it in that, case as the general words stood alone and

there was no context to throw any light on the intention of the parties. In *Steinman and Co. v. Angier Line* (1891) 1 Q.B. 619 one of the principal

cases cited, Bowen L.J stated the rule to be that ""words of general exemption from, liability are only intended (unless the words are clear), to

relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants."" In my opinion these general

words if read with their context are clear. That this artificial rule of construction did not, in the opinion of Bowen L.J., wholly supersede the general

rules of construction which require the whole contract to be read together and effect given as far as possible to every stipulation, and general

words to be construed in the light of their context, I think, may be gathered from the fact that he was at pains to point out that the exception of

negligence in that case did not affect the construction of the general words under construction which dealt with theft, as that was a case of wilful

default not, covered by the exception of negligence. Similarly in *The Pearlmoor* (1904) p. 286 Sir Gorell Barnes when applying the judgment of

Walton J. to the interpretation of the general words then in question relied on the fact that in that particular bill of lading negligence was only

excepted in certain specific cases and not generally, to show that general words not relating to any of those specific cases could not be read as

exempting from liability for negligence. In *British India Steam Navigation Company v. Ratansi* ILR (1896) B. 184 which came before Sir Charles

Far-ran a bill of lading of the present defendants and very much in the present form contained an additional clause now omitted: "if stored in

receiving ship, godown or upon any wharf, all risks of fire, dacoity, vermin or otherwise shall be with the merchant," and it may well have been held

that these words relating to the stage when the shipowner is in possession as warehouse-keeper and enumerating the specific risks which the

merchant was then to bear did not exempt the carrier from liability for negligence merely because the general words "or otherwise" were added to

the specific risks which the merchant was to bear at this stage. That decision, in opinion, comes within the rule now laid down by the House of

Lords that an ambiguous document is no protection.

22. On the whole I have come to the conclusion that in this bill of lading the carriers have sufficiently protected themselves from liability for the

negligence of their servants during the discharge of the cargo. To hold that these general words of exemption have the effect of imposing upon the

carrier a liability for negligence appears to me, with great respect, to be carrying this doctrine of artificial construction further than it has ever yet

been carried and further than it ought to be carried. I am confirmed in this view by the recent decision of the House of Lords in *Nelson Line*

(*Liverpool*) Limited v. *James Nelson & Sons, Limited* (1908) A.C. 16, the report of which has reached India since this judgment was written.

Their Lordships in that case consider the Effect of a clause exempting the shipowner from any damage or detriment to the goods which could be

covered by insurance, words in effect the same as those considered by Walton J. in *Price and Co. v. Union Lighterage Co.* (1903) 1 K.B. 750,

but not standing by themselves as in that case but occurring in a bill of lading in the midst of other complicated and not altogether consistent

stipulations. In the Court of Appeal the case was held to be governed by the rule laid down by Walton J. in *Price and Co. v. Union Lighterage*

Company (1903) 1 K.B. 750. Lord Loreburn remarked that the words taken by themselves seemed to excuse the shipowner from any

imaginable liability except such as could not by law be underwritten. But, his Lordship went on to observe, these words must be considered along

with the context, and considering them along with the other provisions he found it impossible to ascertain what was the intention of the parties, and

then explicitly rested his decision on the ground that an ambiguous document is no protection. His Lordship, however, went on to make certain

other observations in the light of which Walton J's decision and those that have followed it will have to be reconsidered. "I cannot agree in the

contention that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the

importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special

conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document?

23. Applying this standard to the present case I fail to see any element of doubt.

24. The remaining point is whether there are sufficient grounds to justify this Court on second appeal in setting aside the finding of the lower

appellate Court and giving judgment for the plaintiff. Now the suit is brought in respect of 246 bags of rice out of 4,000 bags belonging to the 1st

plaintiff which were carried on board a steamer chartered by the defendants from Rangoon to Tuticorin. The plaintiff alleges that they were not

delivered, but were landed in hurry and confusion and became damaged and unfit for consumption by exposure to heavy rain at Tuticorin without

being covered and that they were consequently destroyed by local municipal authorities whilst in the custody of the defendants 2 to 4, the agents of

the 1st defendant, the British India Company. Now the lower appellate Court has found that the defendants were not guilty of negligence in

allowing the bags to get wet, and, secondly, that the damage to the bags was not in fact caused by their getting wet but was due to the length of

time they were left on the foreshore by the consignees or their agents. Either of these findings is sufficient to dispose of the plaintiffs' suit, and I see

no sufficient reason for differing from either of them. But before coming to them it is important to see on the facts found by the lower appellate

Court or admitted, what was the custom of the port as to the landing of grain cargo. As to the customary manner of landing grain cargo, when the

landing is undertaken by the ship, it is found that the custom which was observed in this case was for the ship to put the bags into boats and to

carry them from the steamer which cannot get within some miles of the shore to the jetty and to discharge the bags unsorted on the jetty, and then

to remove the bags from the jetty and to sort them according to marks on the foreshore when they are at the disposal of the consignee. Now this,

in my opinion, has a very important bearing in the present case, as when the consignee's agents have had notice and are on the spot the ship's

liability even apart from the bill of lading must, in my opinion, absolutely cease when the bags are sorted and stocked and at the disposal of the

consignee. BEAVEN on Negligence in law (Second Edition) Vol. II, p. 1307, cites 3, Kent. Comm. 215. It is then open to the consignee to

remove them or to leave them on the foreshore at his own risk and expense, either protected or unprotected for as long a period as suits his

convenience. What he chooses to do with them is no concern of the carrier, and he cannot be called on to protect them with tarpaulins until the

consignee chooses to remove them. To put the matter in another way, a shipowner or charterer cannot be bound to carry about tarpaulins for the

protection of cargo after he has landed it and placed it at the disposal of the consignees, or to keep a stock of tarpaulins for this purpose ready at

the various ports at which the ship calls. It was not seriously contended that there was any such liability. This being so, as the 246 bags were

admittedly placed at the disposal of the consignees on the foreshore and were not seized and destroyed by the Municipality until three or four days

later, the plaintiffs' claim, in my opinion, is not so much for non-delivery of the bags as for failure to deliver them in good order and condition and

must be so dealt with.

25. If this be so, the only question is: Was the loss of these 246 bags due to damage received owing to the defendants' negligence during the

landing and before they were sorted and stocked and at the plaintiff's disposal on the foreshore? Now it is stated by the late Mr. Carver, Section

461, that the manner of discharging also is, in the absence of special terms, to be determined by reference to the regulations and practices of the

port of discharge,"" and I do not see how a shipowner or charterer who takes power to land cargo at the port of discharge at the consignee's risk

can well be expected to take any greater precautions for the safety of the cargo than are usual and customary at the port. What is usual and

customary in such a case is a good index of what is reasonably necessary for safety. Here the lower appellate Court has found that there was no

custom at Tuticorin to protect grain cargo during landing with tarpaulins during the rainy season and, under these circumstances, I do not see how

we can be justified in interfering with the finding that there was no want of reason, able care in failing to protect them.

26. I think, further, that the conclusion to be drawn from the lower Court's findings is that the lengthy exposure to which some of the bags were

subjected during transit in this case was due to exceptional circumstances which the defendants could not reasonably be expected to have foreseen

- responsibility for which lay not with the defendants but very largely with the 2nd and 3rd plaintiffs, the agents whom the 1st plaintiff employed to

take delivery of his consignment. Of the whole cargo of over 38,000 bags, plaintiffs 2 and 3 together had to take delivery of 22,500 bags including

the 1st plaintiff's 4,000, that is to say, considerably more than half. On Wednesday the 24th October, the day of the ship's arrival, they and the

other consignees received a notice Exhibit I, from the Company's agent at the port requesting them "" to take delivery of the cargo day by day as

landed, as the space for landing on the foreshore was very limited, and pointing out that cargo left on the beach would be at the consignee's entire

risk and expense. A portion of the foreshore it appears, was covered with Government salt for export, and so unavailable for the grain cargo. The

necessity for prompt action on the part of the consignees was all the greater, as the monsoon or rainy season might be expected to set in any day.

Notwithstanding, according to the figures in Exhibit XV, which the lower appellate Court has accepted, the 2nd and 3rd plaintiffs and other

consignees did not remove a single bag on Wednesday or Thursday and only removed between five and six thousand bags on Friday and

Saturday, so that on Saturday night there were over seventeen thousand bags ready for removal on the foreshore and the congestion there was so great that the defendants were unable to go on removing bags from the pier and sorting them on the foreshore, and on Saturday night the whole pier was covered with unsorted bags which had been discharged in the ordinary course from the ship and could not be sorted for want of room on the foreshore. On Saturday night the monsoon burst and such of the 17,000 bags on the foreshore and of the bags on the pier as were unprotected were exposed to the rain. On Sunday the ship suspended discharge at the request of the consignees, but the consignees removed 7,000 bags and 5,000 more were removed from the jetty. On the morning of Monday, the 29th, there were 14,000 ready on the foreshore and two of the pier jetties were still covered with bags. The bags left on the foreshore by the consignees were obviously exposed to greater risk of damage than those on the pier owing to the possible effects of heavy rain on the foreshore.. According to Exhibit IX, it was the bad smell coming from the, bags actually lying in the mud on the foreshore that led to the intervention of the Municipality on Monday, October 29th, when the Sub-Collector was brought down and examined the bags on the foreshore and on the jetties and gave the consignees three days to clear them all, which the consignees undertook to do.

27. Then as to the question whether the damage to these 246 bags was due to wetting received before they were sorted and stocked, as to which the finding is in defendants' favour, it is argued for the appellant that there is nothing to show when these particular bags got wet or how they were damaged and that the onus is on the defendants. This being, as I have said, really in the nature of a claim for failure to deliver in good order and condition, and delivery in the sense of putting these bags at the consignee's disposal being admitted, I think if the consignees-wished to make a claim against the defendants for a total loss owing to the wet condition of the bags "when put at their disposal, it was for them to show the time when the bags were put at their disposal, and that the condition of the bags when put at their disposal was such as to justify them in refusing to take delivery, or in afterwards rejecting these bags. This onus they have failed to discharge.

28. But even putting the onus on the defendants and assuming the case most favourable to the plaintiffs, viz., that these particular bags were exposed on the jetty from Saturday night, I still think there is evidence to support the finding that these bags were damaged not by the wetting but by exposure on the foreshore for which the consignees are alone responsible. The Sub-Collector's action certainly goes to show that the bags which had been exposed on the pier had not sustained any serious damage on Monday morning and would have been all right if the consignees had removed them within three days as they undertook to do-That they had ample opportunity of removing them even earlier is shown by the figures in Exhibit IV, which the lower appellate Court has accepted. On Monday the consignees removed no less than 12,000 bags, leaving a balance of only 2,700 out of the 14,000. awaiting removal on that morning. A further 3,000 had been removed from the jetties and sorted that day, making 5,700 ready on Tuesday morning. If they had gone on at the same rate as on Monday they could have removed on Tuesday not only this 5,700, but also the greater part of the 4,600 sorted that day. The last of the bags so left on the pier on Saturday night must have been sorted and ready for removal on Tuesday when the ship completed her discharge and left the port, as the pier would have been cleared in the ordinary course to make room for the landing of further bags. But for some reason on Tuesday the consignees chose to remove 1,100 only leaving over 9,000 ready. The last B. 3,000 or so were sorted on Wednesday, October 31st, but the consignees only removed 3,000 on that day leaving 9,000, and of these they afterwards removed 8,000 leaving 1,098 (including the 246 which are the subject of this suit), which were seized by the Municipality on the 2nd or 3rd November. I am not called upon to suggest why the consignees were so slow in removing the bags after Monday, but I think the District Judge was justified in view of the above facts in finding that the damage to these bags was not due to the wetting but was due to the length of time they were left on the foreshore. If the 1st plaintiff's bags were left on the foreshore that was obviously due to the action of the two agents he employed to take delivery, the 2nd and 3rd plaintiffs, and the defendants cannot be held responsible. But, as I have already said, even assuming the damage was caused to these bags by the wetting they received before they were placed at the disposal of the consignees, still I think the

District Judge was justified in finding that failure to have tarpaulins ready and to protect the bags with them did not in the circumstances amount to negligence. I am, therefore, of opinion that on the findings and admissions there is no ground for setting aside the findings in favour of the defendants, and I am of course even more strongly of opinion that there are no grounds to justify us on second appeal in arriving at fresh findings in favour of the plaintiffs.

29. I would, therefore, dismiss the appeal with costs, but the decree must be in accordance with the opinion of the majority of the Court.

Sankaran Nair, J.

30. I agree with my Lord the Chief Justice in holding that the loss to the plaintiff was caused by the negligence of the defendants servants. Of the 1,098 bags destroyed, 246 belonged to the plaintiffs, and there is no evidence to show that they were ever ready for delivery by being separated from the rest and, if they were, when.

31. The second question is whether the defendants are exempted from liability by the terms of the bill of lading. On this question also I concur in

the judgment of my Lord the Chief Justice. Briefly my reason is this:

Prima facie the defendants are liable for the negligence of their servants. They have to make out exemption from liability and that can only be made

out, if at all, by showing that the plaintiffs agreed to discharge them from it. It is not enough to use words which were intended by them for that

purpose or which would ordinarily be regarded as exempting them. The cargo Owner knows that the law makes the Company liable, and he must

therefore be told in clear and plain language and in explicit terms that they do not hold themselves liable to him for their servants' negligence to

make up his mind whether under such circumstances he would ship his cargo or not. It must not be left to inference. Unless his attention is drawn to

it, he is not to be presumed to discharge the shipowner. In the case before us, the negligence clause in the body of the bill of lading does not

operate after the goods leave the ship's tackle and the clause or condition inserted later in the bill does not refer to negligence. On these findings

the plaintiffs are entitled to a decree in their favour and it is not necessary to decide the other question raised by Mr. Sundara Iyer that a contract

exempting the shipowner from the negligence of himself or his servants cannot

be enforced in this country. Mr. Justice Subrahmanya Aiyar has left the question open. Mr. Justice Miller was not prepared to dissent from the decisions in which similar stipulations were treated as Tegal. My learned colleagues who have heard this appeal have also expressed their opinion on this point. I proceed accordingly to consider the question. As to the authorities, the cargo owner was not represented in the case *Jellicoe v. The British India Steam Navigation Co.* ILR (1884) C. 489 and there is no doubt in my mind on reading the judgment of the Chief Justice in that case and in the case *Moothora Kant Shaw v. The India General Steam Navigation Co.* ILR (1883) C. 166 that he arrived at his conclusion with evident reluctance. Neither in *Hassanbhoy Visram v. The British India Steam Navigation Company, Limited*, ILR (1889) C. 571 nor in *Hajee Ismail Sait v. The Company of The Messageries Maritimes of France* ILR (1905) C 571, was the illegality of the stipulation raised or discussed. The question, therefore, is not concluded by authority.

32. The rule of law in England which may now be taken to be established by the decisions referred to by Mr. Napier and on which he relies is thus

stated in *CARVER'S Carriage by Sea* Section 101-

Bills of lading now commonly relieve the shipowner from responsibility for negligence of the master or mariners in navigating the vessel. Often the

exception extends to acts of stevedores, and other persons employed by the ship; and sometimes it goes still further, and covers all wrongful acts,

and neglects, and errors in judgment, whether of the owners, or of those in their service, or for whose acts they would otherwise be liable. There is

nothing in our law to prevent the parties from making such a contract. The Legislature has not interfered with shipowners, as it has with railway

companies, to prevent their enforcing contracts which may seem to the Courts not to be reasonable.

33. In Indian law there is, of course, nothing like an unenforceable contract, as only an agreement enforceable by law is a contract. Assuming then

that a shipowner can enter into an agreement with the cargo owner as stated above, can it be possibly contended that we are to enforce in this

country, the English law of contract even where it differs from the Indian law? The validity of the agreement must be determined by the Indian law,

and the fact that the parties stipulate to be bound by the agreement is of no

avail, except in certain cases. Thus, if in making the contract there was no consent, i.e., the shipowner and the other party "" did not agree upon the same thing in the same sense"" or if the agreement was brought about by fraud, undue influence, coercion, or misrepresentation, then there is no valid agreement or contract which an Indian court will enforce even though the parties may state in clear, express and unequivocal terms, that each party shall, in spite of any such invalidating element, perform such contract. No words can take the case out of the operation of the rule of law or exempt the party from liability for damages.

34. Similarly, if the consideration or object of the agreement is opposed to public policy as declared by the Indian Legislature or the Indian Courts, no words in a contract will estop a party from pleading, or the Courts from deciding, that the contract cannot be enforced. It makes no difference, so far as I am aware, in India that it was the agent who was guilty of the particular act which invalidates the contract.

35. Let us then test the validity of this exemption clause by the Indian Contract Act.

36. Section 148 of the Indian Contract Act, as pointed out by the Judicial Committee in *The Irrawaddy Flotilla Company v. Bugwandas* ILR

(1891) C. 620, undoubtedly includes bailment for carriage. This is also the view of the Calcutta High Court in *Mackillican v. The Compagnie Des*

Messageries Maritimes De France ILR (1880) C. 227, and of the Bombay High Court in *Kuverji Tulsidas v. The Great Indian Peninsular Railway*

Company I.L.R. (1878) B 109. A shipowner is a bailee within the terms of that section. u/s 151 of the Act, the defendants, therefore, are bound to

take as much care of the goods as a man of ordinary prudence would under similar circumstances. It is only the incident of any contract not

inconsistent with its provisions that remains unaffected by the Contract Act (see Section 1 of the Contract Act). The incident of the contract before

us, that the bailee is exempt from taking the care required by Section 151, appears to me to be clearly inconsistent with that section. Section 152

seems to make this clear. It declares that the bailee's liability is limited as declared by Section 151, ""in the absence of any special contract"", or in

other words, he may by contract undertake a higher responsibility, for instance, that of an insurer. The Calcutta High Court and the Judicial

Committee relied upon this section to hold that these provisions do not limit the liability imposed by the common law rule recognized in the Carriers

Act, 1865, which was the only point decided in that case. The provision in Section 152 that a bailee may undertake a higher responsibility, the

absence of a similar provision that he may limit the liability imposed by Section 151, and the fact that in Chap. IX relating to Bailment whenever a

rule of law is intended to operate only in the absence of a contract to the contrary it is expressly so stated -see Sections 163, 165, 170, 171 and

174 - leave no doubt in my mind that a bailee's liability cannot be reduced by contract below the limit prescribed by Section 151. In fact,

throughout the Act, whenever the Legislature intended that the provisions of the Act should be enforced only in the absence of a contract between

the parties they have said so. See Sections 109, 113, 116, 121, 93, 94, 95, 202 219, 221 230 241, 253, 256, 261, 265. The obligation imposed

by Section 151 applies to bailees as well as to their servants in the discharge of their duty. The agent represents the bailee binder the Act. The

Contract Act thus sweeps away all the distinctions between the degrees of care required of the bailees. In the English law the amount of care

required seems to depend upon the benefit accruing to the bailee. Under the Contract Act the obligation arises from the simple fact of accepting

delivery or receiving property for a certain purpose and the care to be taken is the same in all cases. Thus, u/s 71, a person undertakes the same

responsibility as bailee from the mere fact of taking goods belonging to another into his custody. The relations between parties may well be left to

be regulated by contract when the degree of care required is dependent upon the benefit derived from the bailment, but when the same amount of

care is required independent of any benefit to the bailee, then it may well be that the Legislature did not think it right to allow the bailee to reduce his

liability.

37. Assuming then that the rule of English law that a common carrier can get rid of his liability by contract has been accepted in India, the contract

itself must be obviously one which will be recognized in the Indian Courts, and, if I am right in the view above set forth, it necessarily follows that

while a common carrier may exempt himself from the liability of an insurer by contract, he cannot exempt himself from the liability of an ordinary

carrier imposed by Section 15 of the Indian Contract Act.

38. Further, let us see whether there is any consideration for the exemption. The English common law is stated in these terms by Lord Blackburn:

"At the common law, a carrier who received goods as such was responsible for every injury occasioned to them by any means except the act of

God or of the Queen's enemies. He was also bound to receive goods tendered to him for carriage and was liable to an action if he refused to

receive them without reasonable excuse and such an action might still be maintained.

39. For any agreement to relieve the common carrier from this responsibility under the common law for negligence, among other things there must

be consideration. In this case what is the consideration? Not the undertaking to carry cargo. Because the defendants as common carriers are

bound on payment of freight to receive and carry it to its destination. Is it then the special rate at which this cargo was to be conveyed? I agree that

the reasonableness of the freight will depend upon various conditions such as weight, measurement or value. It is unreasonable to expect a

shipowner to carry goods worth a few rupees and jewels possibly worth lacs for the same remuneration; the negligence of his servants in the one

case may cause him only a trifling loss while in the other case it might be his ruin. It is only right, therefore, that he should be entitled to demand

higher rates for certain goods, subject to this condition, that they must not be prohibitive rates intended to coerce the owner to accept any

conditions the shipowner might think it fit to impose. In such cases the shipowner may tell the owner, we will undertake the risk only if you pay the

higher rate. Otherwise we undertake no risk. Similarly, according to some English cases, if the shipowner is willing to carry cargo for below what

would be a reasonable remuneration for carrying it at his risk on condition that he is to have no liability at all and the owner agrees to the reduced

rates discharging him from the common law liability there maybe an agreement with a good consideration--see *Peek v. North Staffordshire*

Railway Company . I doubt, for the reasons already pointed out, whether this is permissible under the Indian Contract Act. But in any event, it is

for the shipowner to offer the alternative rates for the owner to make his election. It cannot be said in this case then that the plaintiffs elected to pay

a lower rate on condition that the defendants are not to be liable for their servants' negligence.

40. The other conditions in the bill of lading also require notice. There is a clause that packages of more than a certain weight are only carried at

advanced rates of freight and by special agreement. There is another clause which requires that for gold, precious stones, etc., over the value of

Rs. 500, special shipping order or advice note must be granted after a declaration of their value.. This appears reasonable. But I can see no

consideration for a stipulation that the Company will not be responsible for negligence, even after receiving the higher freight for the greater care

required on account of the nature of the goods. The agreement therefore, so far as this stipulation is concerned, is without consideration.

41. I have assumed throughout that it is open to the shipowner, as common carrier, to enter into a contract of exemption from liability, if such

contract is for consideration and is not opposed to the Indian Law of Bailment. I now proceed to consider the other question whether the common

law liability of a common carrier may be limited by contract in India.

42. In deciding whether the English law to this extent has been followed in India, it is necessary to bear in mind that it makes no difference whether

the exception relates to the negligence of the master or his servants; that the stipulation may be admittedly unreasonable; and that the liability of a

shipowner in cases similar to the one before us is the same as that of an inland common carrier