

(1982) 12 KL CK 0003
In the High Court Of Kerala
Case No : A.S. No. 189 of 1977

New India Assurance Co. Ltd. and Another	APPELLANT
Vs	
San Jose Maritime Ltd. and Others	RESPONDENT

Date of Decision : 23-12-1982

Acts Referred:

Bills of Lading Act, 1856 — Section 1, 3

Citation : AIR 1983 Ker 98 : (1985) 57 CompCas 606

Hon'ble Judges : K. Sukumaran, J;K. Bhaskaran, J

Bench : Division Bench

Advocate : J. Ranganatha Kamath, V.K. Parekh and G. Krishnan, for the Appellant; M. Pathrose Mathai Joseph Vellapally, Siri Jagan and M. Radhakrishnan, for the Respondent

Final Decision : Allowed

Judgement

Bhaskaran, J.—The appellants are the plaintiffs in O. S. No. 48 of 1973 on the file of the Subordinate Judge of Cochin, the first appellant (1st plaintiff) being the New India Assurance Co. Ltd., and the 2nd appellant (2nd plaintiff) being the Kerala State Cashew Development Corporation Ltd. The respondents are the defendants in the suit, the 1st respondent (1st defendant) being San Jose Maritime Ltd. S. A., Panama, the 2nd respondent (2nd defendant) being the General Traders, Ltd., Hongkong, and the 3rd respondent (3rd defendant), being the Malabar Steamship Co. Ltd, Bombay. The suit was one for realisation of damages for shortage in the consignment shipped by M/s. National Agricultural products Board. Dar-Es-Salaam, on board the ship S.S. Salomague, owned by the 1st defendant and chartered by the second defendant. The trial court having dismissed the suit, this appeal has been preferred by the plaintiffs.

2. The plaintiffs' case as averred in the plaint and as spoken to by P. W. 1 Bhaskaran Nair, the Superintendent of the 1st plaintiff company, could be briefly stated as follows:-- The 2nd defendant contracted to carry on board the ship S.S. Salomague, belonging to the 1st defendant, 8750 bags of Dar-Es-Salaam quality

Tanzanian raw cashew-nuts shipped by M/s. National Agricultural Products Board of Dar-Es-Salaam to be delivered at Cochin. The 3rd defendant is the local agent for defendants 1 and 2. The defendants were bound to deliver the said consignments in the same good order and condition in which they were entrusted to them. The consignment was packed in new single gunny bags according to the standard packing usually done for packing cashew-nuts. The 2nd defendant received the cargo for delivery at Cochin, and issued Ext. B1, a true copy of which is Ext. A-1, bill of lading at Dar-Es-Salaam. That showed the weight of the cargo, the total number of bags entrusted, and the marks on the bags. Original bill of lading, Ext. B-1, had been surrendered to the 3rd defendant. Freight was collected by the 3rd defendant on the basis of the weight shown in Ext. A-1. Ext. A-2 is the copy of the invoice dated 30-3-1972 issued by the National Agricultural products Board at Dar-Es-Salaam with respect to the consignment. The consignment was imported by the Cashew Corporation of India (CCI) who in their turn had allotted it to the 2nd plaintiff. Ext. A-3 is the true copy of the letter from the CCI to the 2nd plaintiff intimating them about the allotment. Ext. A-4 is the copy of the letter sent by the 2nd plaintiff to the CCI accepting the allotment. Ext. A-5 is the certificate dated 5-10-1976 issued by the CCI stating that they had received a sum of Rs. 13,63,200/- from the 2nd plaintiff on 12-4-1972 towards the sale value of raw cashew nuts imported per S.S. Salomague. The vessel arrived at Cochin on 13-4-1972; and the 3rd defendant discharged the goods. Sri Jayanarayana Traders who are the licensed clearing and forwarding agents, were engaged as the clearing agents by the 2nd plaintiff. 1115 bags were found torn and in mouth burst condition; and that had occurred during the voyage. M/s. Jayanarayana Traders, the clearing agents, called for a Steamer Survey. The 3rd defendant accordingly got the survey conducted, and issued Ext. A-6 delivery certificate wherein it was noted that the survey revealed that 1115 gunny bags containing 60,098 Kgs. were found torn and mouth burst. In order to ascertain the actual shortage, a joint survey was also conducted. The consignment was insured with the 1st plaintiff company who issued Ext. A-7 Marine Extra Endorsement. In Ext. A-7 there is a specific condition that application has to be given to the 1st plaintiff for survey. The shortage also was covered by the endorsement. Ext. A-8 is the report of joint survey. Exts. A-6 and A-8 relate to the same consignment. Ext. A-8 showed the 2nd plaintiff to be the consignee; the shortage found was 26,442 Kgs.; and that was ascertained after deducting 430 Kgs. of sweepings received. The shortage occurred due to the negligence of the carriers. The survey was held when the goods were in the custody of the Port Trust. The 2nd plaintiff demanded compensation and sent the original of Ext. A-9 letter dated 29-9-1972 to the 3rd defendant (with copy marked to the 1st plaintiff) inviting attention to the joint survey held by the 1st plaintiff and the 3rd defendant on 1115 bags, and claiming a sum of Rs. 45,057.17 being the value of the shortage of 26,442 Kgs. in terms of the survey report Ext. A-10 is the letter dated 9-10-1972 received by the 2nd plaintiff from the 3rd defendant; therein the 3rd defendant took the stand that the carriers were not responsible for the shortage alleged and the claim thereon according to

the terms and conditions of the relative bill of lading, and repudiated the liability to the plaintiffs' claim. Thereafter the 1st plaintiff satisfied the 2nd plaintiff of their claims, as evidenced by Ext. A-11 letter of subrogation. This was followed by the letter, a true copy of which is Ext. A-12, issued by the 2nd plaintiff's recovery agent; and Ext. A-13 is the reply received from the 3rd defendant. Ext. A-14 is the true copy of another letter sent by the recovery agent on behalf of the 1st plaintiff to the 1st defendant demanding the amount. Ext. A-15 is the bill of entry that passed through the customs. The 2nd plaintiff's name as the allottee is shown therein. It is not true to say that the weight indicated in the bill of lading is not correct. Ext. B-1 is a clean bill of lading.

3. The 1st defendant remained ex parte. The contention of defendants 2 and 3 as put forward in the joint written statement filed by them and as spoken to by D. Ws. 1 and 2, Raju and Varadarajan could briefly be stated as follows:-- The 3rd defendant is the agent of the 2nd defendant, not of the 1st defendant; Ext. B-1 bill of lading was issued merely with the shipper's description of packages, weight and other particulars; actual condition or order, weight, measure, quality, contents of the value of the consignment or cargo were not ascertained or known to carrier, and it was specifically declared in the bill of lading itself. The consignment of cashewnuts was not weighed by the carrier or the defendants and the weight of the cargo was never ascertained at the time of loading or receipt of the same on board the vessel; weight entered in the bill of lading is not correct; it is a qualified entry; the statement that the consignment of cashew nuts was handed over and received by the 2nd defendant or their agents or servants in good order and condition is denied; the bill of lading mentioned that the consignment was only in apparent good order and condition and the defendants did not know about the actual condition or order or quality of the goods; the nature of the consignment or the packages, their marks or weight were all not known to the defendants and that fact was stated in the bill of lading; the defendants could not and did not ascertain the nature, condition, quality or weight of the consignment of cashew nuts; the description of the packages as stated by the shippers was merely entered in the bill of lading; the statements and figures entered in the bill of lading about the consignment were all qualified; the averment that the 2nd plaintiff was at all material times the holder and endorsee of the relevant bill of lading covering the consignment is denied by the defendants; the 2nd plaintiff was neither the holder nor endorsee of the bill of lading at any time; the 2nd plaintiff has no cause of action against the defendants, and the suit is not maintainable and has to be dismissed on that ground alone; the 1st plaintiff said to be the insurer deriving their rights from the 2nd plaintiff cannot have any better rights or interest than the 2nd plaintiff; hence the 1st plaintiff also has no cause of action against the defendants; the suit cannot be instituted at Cochin; the 3rd defendant discharged the total number of bags of consignment received by the carrier in the same condition and order in which the consignment was received by the vessel and it is not correct to say that the 3rd defendant discharged it with 1115 bags out torn etc.; no joint

survey with notice to the defendants was conducted; no proper or valid notice as required by law was given to the defendants regarding the alleged loss, damage or shortage; no notice in writing about the so-called loss or damage was given to the defendants before or at the time of removal of the goods; it is denied that 26,442 Kgs. of cashewnuts was found in short weight; there was no failure or neglect on the part of the defendants to deliver the consignment of cashewnuts in the same order and condition it was entrusted to them; the bursting of hags or packages or the bags with torn or slacked or mouth-stitched were only due to the condition and nature of inadequacy or insufficiency of the packing, not due to the neglect or fault of the defendants, and after discharge at the port; and it is not admitted that the value of the alleged shortage in weight of cashewnuts would come to Rs. 45,057.17.

4. The trial court dismissed the suit holding under Issues Nos. 5, 8 to 10 and 12, discussed under paragraphs 4 to 8 of the judgment, that the plaintiffs had failed to prove the shortage alleged in the plaint. Under Issue No. 6, discussed in paragraph 6 of the judgment, it was found that the suit by the 2nd plaintiff on the strength of the subrogation letter, issued to them by the 1st plaintiff, was not maintainable. The finding under Issue No. 7, discussed in paragraph 12 of the judgment, is that the 2nd plaintiff had not obtained any title over the goods, and the 1st plaintiff on the strength of the subrogation letter is not entitled to enforce any claim against the defendants.

5. Before us it was argued by Sri J. Kanganatha Kamath, the counsel for the appellants-plaintiffs, that the trial court was clearly in error in assuming that the 2nd plaintiff was neither an allottee from the CCI nor an endorsee of the bill of lading. He pointed out that from Ext. A-3 letter of allotment from the CCI, Ext. A-4 letter of acceptance sent by the 2nd plaintiff, and Ext. A-5 certificate issued by the CCI showing the receipt of a sum of Rs. 13,63,200/- as the sale value of the goods consigned, it is crystal clear that the CCI had allotted the consignment to the 2nd plaintiff. Ext. A-15 bill of entry which passed through the Customs Authorities also would go to show that the importers, the CCI, had shown the 2nd plaintiff as the allottee. May be that Ext. A-5 certificate was issued by the CCI only in the year 1976. That certificate, however, shows that the sale value of raw cashew-nuts imported per S.S. Salomague was received by the CCI on 12-4-1972. The bill of entry Ext. A-15 dated 13-4-1972 also shows the name of the 2nd plaintiff as the allottee of the cashewnuts imported by the CCI. On a careful evaluation of the documentary evidence referred to above, supported by the oral evidence of P. W. 1, we hold that the court below was not justified in taking the view that the 2nd plaintiff was not an allottee.

6. The court below, we are afraid, did not correctly appreciate the significance of the "indorsement in blank" of the bill of lading. True, there is no indorsement here in the name of the 2nd plaintiff; the indorsement is blank; and the court below thought that the second plaintiff who paid the invoice price and took delivery of the goods consigned was not entitled to maintain the suit for the

simple reason that there was no indorsement on the face of Ext. B-1 bill of lading in the name of the 2nd plaintiff who was not the consignee. Normally, when the goods arrive at the port of destination, the person rightly entitled to the goods, whether as consignee or as indorsee or holder of bill of lading, should be ready to receive the goods. He proves his right to the goods by presenting the bill of lading to the Captain of the vessel. The indorsement is effected either by the shippers or the consignee writing his name on the back of the bill of lading which is called "indorsement in blank", Or by his writing "deliver to 'I' (or order, P)" which is called an "indorsement in full", So long as the goods are deliverable to a name left blank, or to bearer, or the indorsement is in blank, the bill of lading may pass from hand to hand by mere delivery, or may be redelivered without any indorsement to the original holder, so as to affect the property in the goods. But the holder of the bill may, at any time, fill in the blank either in the bill or indorsement, or restrict by indorsement the delivery to bearer, such power being given to him by the delivery to him of such a bill of lading. By mercantile custom such an indorsement and delivery of a bill of lading, made after shipment of the goods and before complete delivery of their possession has been made to the person having a right under the bill of lading to claim them, transfers such property as it was the intention of the parties to the indorsement to transfer. (Scrutton on Charter Parties -- 18th Edition. Section 6. Articles 91 and 92, page 181). Normally the indorsee of a bill of lading, to whom under the particular circumstances of the indorsement the property in the goods shipped under the bill of lading passes, has transferred to him all the rights and duties of the original shipper under the contract evidenced by the bill of lading. Section 1 of the Indian Bills of Lading Act, 1856, lays down:

"Every consignee of goods named in the bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as it the contract in the bill of lading had been made with himself.

The 2nd plaintiff being the endorsee, and the 1st plaintiff who got themselves sub-rogated to the right of the 2nd plaintiff by satisfying claim of the 2nd plaintiff as insurers, are jointly, and the 1st plaintiff severally, is entitled to sue the defendants for recovery of damages.

7. The courts have gone even to the extent of holding that there was no rule of law that the right to sue in tort in respect of damaged goods belonged only to the owner of the goods at the time they were damaged, and since the defendants ought reasonably to have contemplated that any carelessness by them in carrying the goods would cause damage to the person, the C.I.F. buyer at whose risk the goods were at the time in question, they prima facie owed that person a duty of care; that, further, there were no considerations of policy applicable to the relationship between the parties that required the scope of that duty to be limited or extinguished (*Schiffahrt and Kohlen G. M. B. H. v. Chelsea*

Maritime Ltd 1982) 2 WLR 422.

8. It was then contended by the counsel for the appellants-plaintiffs that the court below made an absolutely wrong approach in holding that the plaintiffs did not succeed in proving the damages on account of the alleged short delivery. It was pointed out in the judgment under appeal that the witnesses examined on the side of the plaintiffs were not present at Dar-Es-Salaam to vouchsafe the condition of the packing and also the actual weight of the goods loaded. The documentary evidence available in Ext. B-1, according to the learned Subordinate Judge, was not helpful to the plaintiffs inasmuch as that was stated therein reads:

"..... weight, measure, marks numbers, quality, contents and value unknown....."

The reasoning of the trial court was that the carrier not having acknowledged or accepted any absolute liability inasmuch as in Ext. B-1 bill of lading it was stated as follows:--

"Shipped at Dar-Es-Salaam in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown,....."

inspite of the fact that the number of packets was shown to be 8750; and the weights 6,89,640 Kgs. gross. In support of its decision that Court relied on the decision rendered by one of us (Bhaskaran J.) in *Hajee K. Assainar Vs. The Malabar Steamship Company Ltd.*, wherein it was observed as follows (at p. 117 of AIR):--

"In the instant case, even though the bills of lading evidenced by Exts. P-1 series and P-2 series mentioned the quantity of sugar, it was subject to the further condition that the carrier had not accepted it when the endorsement on the bill of lading is "weight declared by the shippers, but not checked". In the light of the decision which holds that it is open to the carrier to contract out of his liability, I am of the view that the first appellate court was correct in holding that the plaintiff did not succeed in establishing that the weight of the goods shipped was actually as noted in the relevant bill of lading."

That decision, in our view, would not apply to the case on hand. On crucial points the facts are clearly distinguishable. In the instant case, though, after the words "weight, measure" etc. the word "unknown" is found in the printed portion of the bill of lading, on the left side below thereof we find stamped "Shipped on Board". There could be no doubt that the printed form is for the general use; and what is applicable to the particular case is to be found in what is typewritten or incorporated by the rubber stamp, if there is any one of them found in the bill of lading. This view we express finds support in *Corpus Juris Secundum*, Vol. 80, para. 113 at page 910, which reads:

"A printed paper pasted on a bill of lading has been held to be a part of the bill binding on the consignee..... and so stipulations stamped on the face of a bill of

lading, before its delivery to the shipper, and by express terms included therein, become a part of the contract. Typewritten recitals in the bill will prevail over inconsistent printed recitals, as for example a typewritten statement giving the weight of the goods received as against a printed recital that the weight is unknown."

Under Section 3 of the Indian Bills of Lading Act, 1856 --

"Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board:

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims."

The endorsee of a bill of lading is entitled to enforce the rights under the bill of lading on the basis that in regard to weight, package and conditions stated therein are correct. The 2nd plaintiff being an endorsee who has stepped into the shoes of the C.I.F. buyer, and the bill of lading having been stamped with the words "Shipped on Board", which presumably was done after the weight of the goods entrusted for carriage was checked and found correct, the burden of proving that the position is otherwise, squarely falls on the defendants, not on the plaintiffs. The contrary view taken by the court below is not correct either in law or on facts. The decision in *R. & W. Paul Ltd. v. Pauline* (1920 Lloyd" 221) is to the point. In *Attorney-General of Ceylon v. Scindia Steam Navigation Co. Ltd.*, India 1961 WLR 936 : 1962 AC 60 it was held:

"..... though the statements in the bills of lading as to the number of bags shipped did not constitute conclusive evidence as against the respondent, they formed strong prima facie evidence that the stated number of bags was shipped unless there was some provision in the bills of lading which precluded that result, or very satisfactory rebutting evidence was produced by the respondent.

Weight, contents and value when "shipped unknown" was not a disclaimer as to the number of bags, and the appellant was not entitled by the conditions in the bills of lading from relying on the admission that bags to the numbers stated in the bills of lading were taken on board and the respondent was accordingly under an obligation to deliver the full number of bags....."

9. It was argued on behalf of the respondents that the manner in which the quantum of shortage was assessed was quite arbitrary inasmuch as Ext. A-8 survey report was not based on physical verification of all the bags, but only on

the basis of random check. We find that the shortage was assessed by the process of finding out what the weight of 1115 bags would have been had they contained the weight as found in the case of sound bags, and by deducting the weight that was found in respect of the 1115 torn and mouth-burst bags. The contention that the shortage must have been covered by the floor sweeping cannot be accepted, as the evidence of P. W. 1 is that it was shared by all the consignees, and all that the 2nd plaintiff got on that count was 430 Kgs. of course D. W. 2 had stated in his evidence that he was not aware of Ext. A-8 survey though he admits that a joint survey by the 3rd defendant and the clearing agents of the 2nd plaintiff was done. According to him the weight of each bag varied and the correct shortage could be ascertained only on weighment of the entire consignment, not by random weighment. Like P. Ws. 1 and 2, he too was not present at Dar-Es-Salaam at the time of the shipment and, therefore, could not vouchsafe the condition of the bags or the nature of the packing at the time of entrustment. He was not also in a position to say whether the Roods were actually weighed or not. He also admits that in Ext. B-1 the weight of the cargo was indicated as declared by the shipper. It also showed the number of bags and quantity. The collection of freight on the basis of the weight declared also is admitted by him. He had no document to show that the weight shown in Ext. B-1 was not correct. According to him for the purpose of collecting freight the weight as noted in the bill of lading was accepted. During the time of discharge of the cargo he had gone, to the place of discharge several times. He did not know the average weight of a bag, though he knew that the weight of a gunny bag would be about 1 Kg., or a little more or less. Ext. P-6 is a certificate issued by the 3rd defendant company. It showed that 1115 bags were torn and in a burst condition. In *Attorney-General of Ceylon v. Scindia Steam Navigation Co. Ltd.*, India 1961 3 WLR 936 : 1962 AC 60 it was held as follows:--

"It was a reasonable and proper inference in all the circumstances that the bags that were shipped contained rice, and there was evidence, accepted by the respondent, that a full bag of rice weighed about 160 lb. There had, accordingly, been a short delivery of 235 bags of rice each weighing about 160 lb. and on the evidence neither the contents of those bags had been accounted for nor were the 235 empty bags themselves delivered. The appellant was therefore entitled to the damages claimed and not, as contended by the respondent, to the value of 235 empty bags only."

In *William D. Branson, Ltd. v. Furness (Canada) Ltd.* (1955 (2) Lloyd's Rep 179) the facts were as stated below:

Cargo of 43,733 bags of potatoes (sound arrived value, 178,711.25 pounds) found damaged on arrival. Survey was held. Loss on whole shipment estimated by surveyor to be 25 per cent. Claim by shippers to be indemnified by the carriers was upheld by the Exchequer Court of Canada and the shippers were awarded 44,677.81 pounds by way of damages. In appeal filed by the carriers, the damages was reduced by the Supreme Court to 5000 pounds. On appeal by

the shippers the Judicial Committee of the Privy Council held:

"In the light of the available evidence the issue could best be determined by the contemporary documents, the competence of the surveyor, and the probabilities, and that so tested there were not sufficient grounds to justify the Supreme Court in rejecting the surveyor's evidence on the quantum of damages. Appeal allowed. Judgment of Exchequer Court restored."

10. It would also appear that the trial court was not correct in taking the view that Ext. B-1 was not a clean bill of lading, inasmuch as in regard to the condition of the goods or number of bags consigned there is no dispute. Even assuming that Ext. B-1 was not a clean bill of lading, on the facts and in the circumstances of the case, and in the light of the position in law discussed above, we are of the opinion that the plaintiffs were entitled to succeed in their claim for damages.

11. The counsel for the 3rd respondent submitted that the 3rd respondent was acting only as the agent of the 2nd defendant, and as such no individual or separate liability, apart from what could be fixed on him as the agent of the 2nd defendant may be cast on him. We accept this contention.

12. The result, therefore, is that the appeal is allowed; the judgment and decree of the court below are set aside; and a decree for the amount claimed in the plaint with interest at 6% per annum from the date of suit is granted in favour of the 1st plaintiff against the defendants, the liability of the 3rd defendant being restricted to that of the agent of the 2nd defendant. The appellants-plaintiffs are entitled to their costs both in this court and the trial court.

13. Carbon copy of this judgment may be granted to the parties to the appeal on usual terms if applied for in that behalf.

14. Immediately after the judgment was pronounced the counsel for the 2nd respondent made an oral submission for leave to appeal to the Supreme Court under Article 134A(b) of the Constitution of India. This case does not involve any substantial questions of law of general importance which, in our opinion, require to be settled by the Supreme Court. Hence leave prayed for is rejected.