

(1993) 07 MAD CK 0058
In the Madras High Court

Phonix Enterprise Co. Ltd., and Another	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision : 08-07-1993

Acts Referred:

Contract Act, 1872 — Section 230

Citation : (1993) 2 MLJ 603

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—Defendants 2 and 4 have preferred this appeal against the decree passed by the Principal Subordinate Judge, Cuddalore, for a sum of Rs. 62,012.25 with interest thereon at 6% per annum from the date of plaint till the date of realisation. The suit was dismissed as against defendants 1 and 3.

2. The case of the plaintiffs is this: The first defendant is the owner Disponent and/or carriers and as such is interested in the vessel viz., "orient glory". The second defendant is the carrier of goods by sea and also the ship owner. The third defendant is the agent of the second defendant in Japan. The fourth defendant is the agent of the second defendant in India. A consignment of 1,70,000 bags of urea of a total weight of 85,58,140 kilos was shipped under four bills of lading marked as Exs.A-35 to A-38 at China, Japan, in the vessel "orient glory" to discharge at the Indian ports. The port of discharge is Cuddalore. The ship arrived in Indian port and unloading began on 3.3.1975. It was concluded on 12.3.1975. But, even that date, a provisional claim was made on behalf of the plaintiffs by their agents on the ground that the goods were damaged and there was a short delivery. The claim was rejected by the fourth defendant for itself and on behalf of the second defendant. It was found on a survey by the plaintiffs that there was a not shortage of 3 Metric Tons. The cost worked out to Rs. 61,398.27. and adding 1% thereof as insurance charges, the total loss was Rs. 62,012.25. Thus, the suit was filed for recovery of the said amount as according to the plaintiffs, all the four defendants are liable to make

good the loss.

3. Defendants 1 and 3 remained ex parte. The fourth defendant filed a written statement which was adopted by the second defendant. The case set out in the written statement is as follows: The second defendant is only the operation manager of the ship and the fourth defendant is its agent. The second defendant is not owner of the ship and; therefore; no liability is attached to the second defendant or its agent the fourth defendant. The third defendant is the agent of the second defendant in Japan and the ship was chartered by the first defendant under a charter party agreement dated 1.2.1975 entered between the first defendant and Far East Corporation Private Limited, Hong Kong, who acted as the agents of the owner of the ship. Any dispute should be settled only by arbitration in accordance with the clause in the charter party. The vessel was responsible, if at all, only for the number of bags shown in the Bills of Lading and not for the weight or the quantity or quantity or the contents thereof. The initial hatch survey conducted by the Port officer immediately on arrival of the ship at the Cuddalore Port revealed that the entire cargo of 1,70,000 bags of urea were well stowed, trimmed and dunnaged and there was no damage to the cargo and there was no sign of any water inside the hatches. The certificate of completion of discharge, jointly signed by the plaintiffs, their clearing agents, the fourth defendant and the Master of the ship showed that the entire cargo was discharged and there were no ship sweepings or other gunny bags left or lying in the ship, and that there was no shortage. There was no possibility of any part of the cargo having been lost or pilfered while in the custody of the vessel upto the discharge from the vessel. There was every possibility of the contents of the bags being spilled out while the bags were being hauled up by rope slings from the holds of the vessel and while being lowered into the boats and subsequently carried by the boats to the shore and after being unloaded from the barges being carried and stacked on shore. There was excessive use of books by the stevedore labourers employed by the plaintiffs agents and the same was the subject matter of numerous complaints in writing by the fourth defendant as well as by the Master of the ship. On account of such indiscriminate use of hook, there was lot of spillage of cargo due to the tearing of the bags by the hooks. Further, the use of rope slings also resulted in the bags getting busted at the time of discharging into the barges kept alongside the ship. There was gross negligence in handling the cargo by the plaintiffs agents and as many as 601 bags of urea were lost over board into the sea in the course of discharge. There was also extra-ordinary delay of two months in conducting the survey. Thus, defendants 2 and 4 cannot be made liable, particularly after the delivery was completed.

4. The trial court after considering the evidence on record, held that the second defendant was the owner of the ship and the fourth defendant was the agent of the second defendant. The trial court found that there was no negligence on the part of the plaintiffs' agents who cleared the goods. It was held that hooks were not used while unloading the cargo and the rope slings did not cause damage to the bags. It was also found by the trial court that the fourth defendant was an

agent of the undisclosed principal and it was actively representing the second defendant with the result that it was also liable. Consequently, the trial court held that defendants 1 and 3 were not liable and defendants 2 and 4 were liable to make good the loss caused to the plaintiffs. In the result, a decree was passed.

5. In this appeal, learned Counsel for the appellants contends that the second defendant was only an operation manager and not the owner of the ship. There is no evidence on record to prove that the second defendant was an operation manager. The second defendant has not chosen to produce any record whatever to that effect. What all we have in evidence in the ipso dixit of D. W.2, who is Claims Officer in the fourth defendant concerned. Apart from his oral evidence, there is nothing on record to show that the second defendant was an Operation Manager. Ex.A-30 is a reply given by the fourth defendant to the Nagapattinam Import and Export Corporation, the clearing agents of the plaintiffs on 22.7.1975. While refuting the claim of the plaintiffs' agents that defendants 2 and 4 were liable for damages, the fourth defendant did not choose to put forward a claim that the second defendant was only an Operation Manager and not the owner of the ship. In that letter it was only stated that the carrier was not responsible for the lost over board bags since the carrier's responsibility ceased when once the cargo left the ship tackles. Thus, the fourth defendant admitted in a way that the second defendant was the carrier and not merely an Operation Manager of the ship. Similarly, in Ex.A-32 dated 26.9.1975, there was no plea that the second defendant was an Operation Manager. On the other hand, the second defendant was referred to in that letter also as carrier. However, there is positive evidence against the plea raised by the second defendant to show that it is the owner of the ship. Ex.A-24 is a certificate of Completion of Discharge issued by the master of the ship. At the bottom of the certificate, the Master of the ship has signed and affixed the seal of Phoenix Enterprises Co., Ltd., Hong Kong, the second defendant. On behalf of the fourth respondent, its representative has signed the said certificate. Similarly in Ex.A-25, the master of the ship has signed and the seal of the second defendant has been affixed. There is no explanation in the evidence of D. W.2 as to how the seal of the second defendant is affixed by the master of the ship when it is their case that the second defendant is only an Operation Manager. More than these two documents, there is clinching evidence in Ex.B-4, an office copy of a letter produced by D.W.2. No doubt the contents of the letter are not accepted by the court below, as the document has been produced at late stage and there is considerable suspicion surrounding the document. We will deal with that aspect of the matter at the relevant stage. But, for considering this point, there is an admission in the letter which shows that the second defendant is the owner of the ship. Ex.B-4 is typed on the letter head of the second defendant. It is addressed to the second plaintiff. It is signed by the chief officer of the ship. A copy is marked to the second defendant and within brackets it is described "The Owners". Another copy is marked to the fourth defendant and within brackets it is described as "Agent". Thus, the document produced by the fourth defendant

itself shows that the second defendant is the owner of the ship and not merely Operations Manager. We have no hesitation in rejecting the case of the appellants that the second defendant was only Operations Manager.

6. The next contention of learned Counsel for the appellants is that at the time of unloading, the plaintiffs' agents were using hooks which caused the tearing of the bags resulting in heavy spilling of the cargo. There is no evidence with regard to this aspect of the matter excepting that of D.W.2. In support of his evidence, Ex.B-4 has been produced. D. W.2 has been cross-examined with reference to Ex.B-4. In one place he says that the Chief Officer of the ship gave Ex.B.4 to him during the course of operation and these Ex.B-4 is not a copy received by the fourth defendant. According to his version, the said copy has been sent to the owner. Immediately thereafter, he adds that Ex.B-4 was brought from Hong Kong. He also admits that there is no evidence to show that Ex.B-4 was sent to the second plaintiff. Later, he states in the cross-examination itself that Ex.B-4 is the copy sent to the fourth defendant for its file. Thus, he is giving contradicting versions regarding Ex.B-4. The Court below is right in rejecting Ex.B-4 as evidence of the user of hooks by plaintiffs' agents. The only purpose for which Ex.B-4 has been produced by the fourth defendant is to establish its version that the plaintiffs' agents were using hooks while unloading the cargo from the ship. The document has not been proved to be true. Hence, no reliance can be placed thereon. Apart from that document, there is no other document to show that the defendants were making complaints as against the use of hooks. The plea of the defendants is that they were repeatedly complaining in writing as against the plaintiffs' clearing agents using hooks indiscriminately while unloading the bags. But, not even one such complaint has been produced.

7. On the other hand, the positive evidence of P.Ws.1 to 3 is to the effect that hooks were not used by the clearing agents at the time of unloading the goods. In the cross-examination, that aspect has not been adverted to by the defendants' counsel. In fact, P. W. 1 has stated that there was no necessity at all for using the hooks. He has asserted the same when a question was put to him on that in the cross-examination. The port officer at Cuddalore had been examined as D.W. 1 by the defendants and he has conveniently stated that he was not present at the time of unloading. Hence, he cannot say anything about the use of hooks. Hence, the finding of the Court below that at the time of unloading, hooks were not used is acceptable and we confirm the same.

8. The next contention of learned Counsel for the appellants is that the hatch survey report marked as Ex.B-1 proves that there was no damage to the goods when they were in the ship. Ex.B-1 shows that six hatches of the vessel were opened on 2.3.1975 and the cargo was found stowed below deck in all the six hatches. It is stated therein that the watertight integrity of the holds were well taken care of and the ventilators of the ship were examined and found to be in good condition. It is also stated that there is no visible sign of sea water having entered in the holds through the hatches, nor was any sweating noticeable and

all visible cargo appeared to be in good condition. The significant words are "visible cargo". While referring to Ex.B-1, D.W. 1 has deposed that the hatch survey is conducted mainly to find out the wettagage in the ship during the voyage and it has nothing to do with the quantity loaded or unloaded. He adds that the survey authorities act by the Bill of Lading, which is the conclusive document of title for ascertaining the quantity and he had referred to only "visible cargo" in Ex.B-1. He admits, "I can only view first two layers. What was underneath, I can't say. Only when the bags are lifted for discharging we can find out the damage or condition." Thus, the evidence of D.W. 1 itself proves that Ex.B-1 will not help the case of the defendants in any manner.

9. Exs.A-1 and A-2 are boat notes prepared at the time of discharge of goods. P.W.3 has stated that boat notes were prepared then and there at the time when the goods were unloaded. It is seen from Exs.A-1 and A-2 that the bags were slack and torn. No doubt, there is an endorsement on the boat notes that the ship is not responsible for the damages. We will consider the liability of the ship a little later. For the purpose of deciding the question of fact, it is sufficient to point out that Exs.A-1 and A-2 clearly prove that the bags were torn and the goods were damaged even inside the ship when they were in the hatches. The evidence of P.Ws.1 to 3 makes out that there was no chance of the damage having been caused at a later stage. The various versions put forward by the defendants that the goods were stalked in open yard and got damaged because of the weather, the bags were lifted by the rope slings and got busted and hooks were used, have not been established. The court below has considered the entire evidence on this aspect of the matter in paragraphs 7 to 13 of the judgment and we do not find any necessity to repeat the discussion here. We do not find any infirmity in the discussion or appreciation of the evidence and we affirm the finding of the court below that there was no negligence on the part of the plaintiffs' agents at the time of unloading.

10. It is next argued by learned Counsel for the appellants that the plaintiffs' agents cleared the goods and, therefore, the defendants cannot be made liable. Reliance is placed on the judgment of a Bench of this Court in the *The Food Corporation of India Vs. The Prosperity Steamship Company S.A.*, . In that case also there were boat notes which showed that the bags were in damaged condition and a similar endorsement that the ship was not responsible for the damage was found. On the facts it was found that the plaintiffs' agents cleared the goods. But, the significant fact is that the plaintiffs' agents did not put forward a case that the bags were found slack or torn in the ship even before they were removed from the ship by them. Relying on that aspect of the matter, the Bench observed, "since the plaintiffs agents who handled the goods, have not come forward with any case that the bags were found slack or torn in the ship itself, before they were removed from the ship by them, it is not open to them now to say that the defendant is responsible for the loss." After referring to the boat notes, the court observed that there was no protest against the endorsement therein that the ship was not responsible. In that case, a plea was

put forward by the plaintiff that a letter of complaint was given under Ex.A-10 to the Master of the ship. It was found as a fact by the Bench that Ex.A-10 was not served on the Master of the ship and there was no evidence that the document was ever sent by the plaintiffs agents to the Master of the ship. It was also found that there was no protest at any time when the goods were received by the plaintiffs agents, before the delivery was completed. On those facts, the Bench held that the ship could not be made liable for the damages. But, on the facts of this case it is clear that even the provisional claim was made before the delivery was completed on 12.3.1975 under Ex.A-21. The same was served on the fourth defendant and copies were forwarded to the offices of the second plaintiff. In the present case; it is the specific plea of the plaintiffs that the bags were found torn and slack even inside the ship and the said fact has also been proved by evidence. Hence, the above ruling will not apply to the present case.

11. It is next contended that the rules relating to a common carrier will not apply to a carrier by sea. Reliance is placed on the judgment of a Division Bench of this Court in *Thakur Shipping Co. Ltd., Bombay and Another Vs. Food Corporation of India*, . It was held that in law a ship owner whose ship is chartered will not stand in the same position as a common carrier to the owner for any loss or damage caused to his goods when they were carried on the vessel and on the other hand; the liability of the chartered vessel would be only that of a bailee for reward and if he had exercised due care and diligence; he could not be held liable for any loss or damages sustained by the owner of the goods. The Bench; however, pointed out that the question of treating the owner of a chartered vessel on par with a common carrier will arise only in the absence of a special contract between the parties. On the facts of that case, the Bench found that there was a special contract and, therefore, the ship could not be equated to a common carrier. In this case, there is no such special contract and the ruling of the Bench will not apply. The Bench also laid down the following proposition of law in that case:

33. Thus, a review of the reported case and the ratio laid down, therein clearly goes to show that the statements in the bills of lading regarding the number of bags, tins or containers that are shipped would constitute sufficient evidence against the ship owner about the exact number of bags, tins or containers being shipped. But in so far as the weight, contents and value are concerned, if there is an endorsement that they are not known or if there is a qualifying remark indicating that the master of the vessel has entered those particulars in the bills of lading in accordance with the figures given to him by the shipper or consignor, then the statements in the bills of lading regarding those particulars would not be binding on the ship-owner and it will be for the shipper or consignor to prove that the consignments loaded on board the ship were of the same weight and the "contents were of the same nature and the value was of the same figure as those noted in the bills of lading. The hypothesis on which such a dictum has been laid is not far off to see. In so far as the number of bags, tins or containers is concerned, they can be easily verified by a "visual check and the checking

process will not involve any complicated procedure. On the other hand, checking to weight or nature or the value of the contents of the consignment, that is shipped will involve specialised tests and will also prove to be a time consuming exercise which the ships cannot afford to do for various reasons, such as, the cost factor, the adherence to departure, and arrival schedules, the lack of facilities for conducting such checks etc., Therefore, it is that if a bill of lading contained a disclaimer clause, it will not have effect in so far as the number of bags, tins, etc., are consigned, as no mistake can be made by the master of a vessel about those particulars. But in so far as the weight, contents and quality are concerned, the disclaimer clause will certainly operate and in such a situation, it will be for the shipper or consignor to prove by adequate evidence, that the particulars regarding weight contents etc., entered in the bill of lading represent the correct weight and the exact quantity of the goods which are loaded on board the ship.

12. In this case, there is no qualifying remark in the bills of lading to indicate that the weight was not accepted by the Master of the ship at the time of loading. Hence, the weight of the goods as shown in the bills of lading is conclusive as between the parties.

13. It is the argued the fourth defendant is only an agent of the second defendant and cannot be made liable independently. Admittedly, the fourth defendant never disclosed its principal. Even in the written statement the owner is shown as Eastern Glory Enterprises and not the second defendant. In the Landing certificates under Exs.A-24 and A-28, the fourth defendant has simply signed as the agent. Even in Exs. A-30 and A-32, the name of the principal has not been disclosed. We have already referred to the fact that the two documents merely mention that the carrier was not responsible. In the cross-examination D.W.2 state that he does not know who the owner of the ship is and that the fourth defendant did not disclose the name of the owner of the ship to the second plaintiff. Significantly, he has deposed that after this suit, the fourth defendant made enquiries and ascertained as to who was the owner and that the owner was in foreign country. The relevant sentence reads thus in Tamil:

In those circumstances, the fourth defendant cannot claim that it is not liable by virtue of the first part of Section 230 of the Contract Act.

14. It is next contended that the fourth defendant was retained or engaged an agent only for the purpose of attending to the husbandry but there is no merit in this case. D.W.2 admits in the evidence that he was present very often and attending to the discharge of the cargo from the ship. D.Ws.1 to 3 have deposed that the fourth defendant is the steamer agent of the second defendant. There is no cross-examination on this aspect of the matter. The port officer at Cuddalore who is examined by the defendants as D.W. 1 has also stated that he went and inspected the hatches at the request of the fourth defendant. He has deposed that the fourth defendant has been appointed as the agent of the foreign ship owner. Ex.B-3 is the office copy of the letter written by the second defendant to

the fourth defendant on 17.2.1975. It is seen therefrom that the fourth defendant was appointed as the second defendants agents. The second defendant requested the fourth defendant to advise it on the disbursement of the cargo. Two sets of charter party were enclosed in the letter and the fourth defendant was requested to pass one set to the Master of the ship. Ex.A-10 is a letter written by the fourth defendant as agents to the second plaintiff informing them of the readiness of the ship for discharging the cargo. Ex.A-24 is a certificate of completion of discharge issued by the Master of the ship. In that certificate the fourth defendants representative has signed and fourth defendant is described as the agent. Similarly in Ex.A-28, which is the landing certificate issued by the Superintendent, Central Excise, Cuddalore, copy of which is marked to the fourth defendant. Exs.A-30 and A-32 are again letters written by the fourth defendant as agent of the second defendant. In none of the documents, the scope of the duties of the fourth defendant are confined to the husbandry or any other particular aspect of the agency. Thus, the fourth defendant's case that it was appointed for a particular purpose is disproved. In the circumstances, we agree with the finding of the court below that the fourth defendant was retained as steamer agent for all purposes.

15. In the result, we reject all the contentions put forward by learned Counsel for the appellants and hold that there is no merit in the appeal.

16. The appeal is dismissed with costs.