

(1924) 12 MAD CK 0060
In the Madras High Court

P.K.P.S. Sivanadian Chettiar

APPELLANT

Vs

Batchu Surayya and Others

RESPONDENT

Date of Decision : 04-12-1924

Acts Referred:

Citation : AIR 1925 Mad 727 : (1925) ILR (Mad) 459 : 87 Ind. Cas. 127 :
(1925) 21 LW 445 : (1925) 48 MLJ 413

Hon'ble Judges : Phillips, J

Bench : Division Bench

Judgement

Phillips, J.—I agree. I am quite clear that neither under the contract Ex. A, nor under the doctrine of English Law can the Rs. 6,600 advanced be treated as "advance freight." "Advance freight" must connote freight, , and it is clear from the authorities referred to by my learned brother that the idea of freight does not arise until the voyage has actually begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading. In this case the ship has never been loaded nor was it attempted to be loaded and, consequently, there can be no question of freight. Even if the provisions of the Indian Contract Act are applied to this case, (it is unnecessary to decide this point which has not been argued before us) the plaintiff must succeed under the provisions of Section 65, because the contract has become impossible of performance.

2. Odgers, J. : This was a suit for the recovery of a sum of Rs. 6,600 payable on a contract of charterparty (Ex. A) entered into between the plaintiff and defendants. The Subordinate Judge has held that by the terms of Ex. A this sum was in fact paid by the plaintiff as "advance freight" which is, by a doctrine peculiar to the English Law, irrecoverable; how this occurs is explained by Brett, J., in *Allison v. Bristol Marine Insurance* Co. 1 AC 209. The plaintiff has appealed. Ex. A after clauses contracting for two voyages of the defendants' barque Bhagyalakshmi from Akyab to Jaffna proceeds, "Payment of freight at the above rates to be made as:

1. Rs. 6,600 (Rupees six thousand and six hundred only) advance on acceptance of the charterparty paid by charters" representative Sabapathi Chettiar at Cocanada, subject to deduction of Rs. 3,300 per trip in loading.

2. Rs. 3,300 to be paid in Akyab per each trip in the time of lading.

3. The balance freight as the vessel reaches her destination and lands the cargo.

Thus the whole sum of Rs. 6,600 was payable on signing Ex. A, but half of it was to be notionally distributed at Akyab on each trip at the time of loading there. Ex. A was made on 9th October, 1919, the first voyage was to be in January, 1920 and the second February-March, 1920.

3. The money was paid but no voyage was made according to the charterparty by the Bhagyalakshmi as she stranded on the Nellore coast while proceeding to Akyab to load for her first voyage.

4. The question is whether this sum of Rs. 6,600 is advance freight. In Leake on Contracts (7th Edition), page 73, the doctrine as to advance freight is said to be an example of money paid for an executed consideration if it was in fact the consideration bargained for and cannot be recovered back merely on the ground that it proved to be of no value. The learned author says, "Upon this principle freight paid in advance cannot be recovered back after the voyage has commenced, though the goods are lost during the voyage; for it is the uniform though perhaps anomalous rule that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea. "The words to be noted here are " after the voyage has commenced. "

5. In Weir and Co. v. Girvin and Co. (1900) 1 QB 45, Vaughan Williams, L. J. at page 52 refers to the old view that advance freight was different from freight and meant a loan or a sum payable when goods were put on board, in consideration of their being received on board. The opinions of the Law Lords in Allison v. Bristol Marine Insurance Co. 1 AC 209 make it clear that "freight whether used in respect of advanced freight or otherwise always has the same meaning : the practical difference between advanced freight and freight is a difference arising from the stipulations which are made as to payment. "Lord Esher, M.R. in Smith Hill and Co. v. Pyman Bell and Co. (1891) 1 QB 742 says : "Now there are two peculiarities of the English Law as regards freight : first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced, although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the shipowner; and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is payable at the moment of starting and even if not paid can be recovered by the shipowner from the charterer upon the loss of the ship." Advance freight is then payable "at the moment of starting " or in other words the ship must sail, unless there is some special contract to the contrary. As against this Mr. Somasundaram for respondents relies on A. Coker and Co. ,Ltd. v. Limerick Steamship Co., Ltd. 118

LT 726 where freight was on the contract payable in Liverpool before sailing on signing the bills of lading. Some of the Bills were signed and the House of Lords held that under the agreement a proportional part of the advance freight became payable on the signing of each bill of lading. The question turned on the construction of the charterparty. In the present case no cargo was loaded and no bills of lading signed. The case in the House of Lords can have no bearing on it. It appears to me therefore that the present payment of Rs. 6,600 can in no sense be viewed as advance freight. It was a pure advance made to the defendants on account of what would be payable to them as freight by the plaintiff but the conditions precedent, viz., the starting of the voyage or at least of loading were absent to make it amount in law to advance freight. The wording of Clauses (1) and (2) above proves this and there are no special clauses, e. g. as to freight being payable on signing bills of lading.

6. A faint attempt was made to argue that the defendants were competent to substitute another vessel, the Mahalakshmi for the Bhagyalakshmi and were entitled to compel the plaintiff to accept her. The documents show that some such proposal was made. The Subordinate Judge has held that it never got beyond the stage of proposal and that plaintiff never consented to the substitution. The authority of Carver on Carriage by Sea (Art. 304) clearly shows that a shipowner is only entitled to compel the acceptance of a substituted ship after the voyage in the ship contracted for has begun, which is not the case here. The appeal must be allowed with costs throughout; interest will be calculated at six per cent. from date of plaint.