

(1926) 12 CAL CK 0043
In the Calcutta High Court

Sir William Henry Turner and Others

APPELLANT

Vs

Kilburn and Co.

RESPONDENT

Date of Decision : 20-12-1926

Acts Referred:

Contract Act, 1872 — Section 229

Citation : AIR 1927 Cal 332 : 101 Ind. Cas. 854

Hon'ble Judges : Rankin, C.J;C.C. Ghose, J

Bench : Full Bench

Judgement

Rankin, C.J.—The plaintiffs as owners of the S.S. Zingara Sue the defendant firm as charterers under a charter party dated 22nd November 1920, for damages for the detention of the vessel caused by the defendants' failure to provide a cargo at the proper time. The charter party was for two consecutive voyages from Calcutta to a place called Dwarka on the Bombay side. The cargo is described in the charter party as "a full and complete cargo of coal in bulk,"

2. The detention complained of extended as regards the first voyage from 14th December 1920 to 13th January 1921, and as regards the second voyage from 8th March 1921 to 27th March 1921.

3. The defendants are managing agents of certain collieries and in November 1920, were arranging to supply two cargoes of coal to the Dwarka Cement Co. Ltd., beginning with a shipment early in December. The defendants having arranged to charter a steamer for the purpose it would appear that a Mr. Foster acting for the defendants saw a Mr. Cruickshank of Messrs. Graham & Co, about securing a vessel. It is said by the defendants that these two gentlemen were apprehensive of difficulties arising in the way of effecting shipment in time and that accordingly they arranged between them certain special clauses which are to be found in the charter party. The term³ of the eleventh clause and of the exception clause are here indicated particularly.

4. Now it can be said at once that these special terms are admittedly of no

service to the defendants in the present case. They are to the same effect as the clauses numbered 3, 11 and 25 which were canvassed by the Judicial Committee of the Privy Council in the recent case of "Baron Ardrossan." But learned Counsel for the defendants on this appeal conceded that the exception clauses were of no use to him on the facts before us.

5. Now the Zingara was ready to commence loading on the 4th December 1920. She was not in the coal dock but in a proper waiting place in the stream. It is clear that had the defendants been minded to load her with coal that was coming by Railway from their collieries, they would have encountered no difficulty from the Port authorities. The Harbour Master upon request from the ship would have deputed his assistant to take the Zingara into the dock and to the berth at which the defendants were proposing to load. The trouble was that the defendants were proposing to load four or five ships with coal: that the vessels were all waiting; that the defendants had coal coming along sufficient to enable them to load one vessel at a time and no more; and that the defendants took each in turn according to the data at which, she had been ready to load.

6. These facts bring the case clearly within the "Baron Ardrossan," case, decided upon the very same facts as are here proved.

The Port authorities did not mind which steamer, out of number of steamers belonging to the same agents, was loaded first. Their order of loading was entirely under the control of the agents and the dock authorities were entirely indifferent in the matter.

7. These are the words of Chakravarti, J., quoted with approval by the Judicial Committee and if the word "Suppliers" be read instead of "agents" they meet this case exactly. It is not possible to say that it was by reason of any regulation or natural condition of the port that the Zingara could not get to a loading berth. It was because the defendants had no cargo ready for her. They had coal - a certain amount of it - but no coal for the Zingara.

8. In these circumstances it would seem difficult for the defendants to avoid the conclusion that they failed in their duty as charterers to have the cargo ready and that by reason of their default the vessel was detained. The main ground upon which learned Counsel on their behalf, based his argument was that at the time Mr. Foster and Mr. Cruickshank arranged the charter party it was well known to both that the defendants would only have one loading berth at a time and coal only for one vessel at a time that they had sold two cargoes per month to Graham & Co.; that they were getting this coal from a certain colliery of which they were managing agents, and that their practice was to load the vessels in their order of readiness to load. This line of reasoning has commended itself to the learned Judge who is of opinion that delay of the kind which occurred to the Zingara was delay which Graham & Co., ought to have contemplated and did contemplate and that accordingly it cannot be regarded as unreasonable. With great respect to the learned Judge I cannot agree with this view of the principles

applicable to the case. I have the greatest difficulties in seeing how the defence upon which the defendants succeeded was open to them in view of their pleadings and in view of the refusal of the Court to grant leave to amend by inserting into the written statement the proposed paragraph (marked 3 B) and set out in the 22nd clause of the defendants' petition of 15th July 1925. The scope and character of Graham & Co.'s agency for the shipowners and the conditions upon which the knowledge of Graham & Co., can be imputed to the owners in view of Section 229 of the Contract Act, are matters which require to be investigated and considered.

9. But even if these difficulties can be surmounted the defence cannot be sustained in law. The cargo specified in the charter party was coal - not coal from any particular colliery. No one suggests that under this charter party the Zingara could have refused on the second voyage to load coal brought from Messrs. Sarcar. The prima facie right of the ship-owner is to say that the provision of the cargo is no part of his concern and that it is an absolute duty resting by the contract on the charterer. It may be qualified by an exception clause but such a clause (unless on unusual terms) will only take effect if the charterer has really been prevented from providing a cargo of the kind prescribed by one or more of the specified clauses. There may well be cases where, apart from any exceptions stipulated in the charter party, and apart from any express reference in the charter party to the custom of the port, owner and charterer can be treated as contracting with reference to the regulations or natural conditions of a port. Where the cargo stipulated for is to be one provided from a particular place (e.g., a certain colliery) circumstances affecting supply from that source may, if known to both parties, be circumstances with reference to which the charterers promise to have a cargo ready has to be construed. If *Jones v. Green* [1904] 2 K.B. 275 was rightly decided it was on these principles, and it is on these principles that "colliery turn" may become important. But it is another matter altogether to hold the charterer excused for failure to have this cargo ready in a case of the present character and on the grounds relied on by the learned Judge. When the parties have agreed on the terms of the exception clause in view of the facts known to them and of the extent of the risk each is prepared to take, to impute to the owner's agent knowledge of the charterer's intention to limit himself to loading one ship at a time, knowledge of his proposed sources of supply and of his general practice in deciding between the claims of one customer as against another, to treat these matters as qualification of his undertaking to have a cargo of coal ready - this is to have little or nothing of "the well-recognized principle of commercial law" as Lord Halsbury described it: *Arden Steamship Co. Ltd. v. Andrew Weir & Co.* [1905] A.C. 501 that the "merchant is under an absolute obligation to supply the cargo." It is a mere infraction of the rule as to the construction of written instruments. There is no analogy between "colliery turn" and "suppliers turn." The matters relied on in this case have been taken to excuse the charterer in spite of the fact that they were not causes which prevented him or rendered it impossible for him to supply a cargo to this ship.

They are more formidable to the owners than any ordinary exception clause would make them. They are matters for the charterer's consideration before he makes his bargain and it is open to him after he has made his bargain to change his practice so as to keep his bargain. These circumstances are not notice to the owners, that the charterer is not proposing to have a cargo ready even though he be not hindered by any cause within the specified exception. The concluding words of Lord Sumners speech in *Bunge Y Born Co. v. H.A. Brightman & Co.* [1925] A.C. 799 apply to any such theory.

10. As regards the dicta relied on by the learned Judge from *Harrowing v. Dupre* [1902] 7 Com. Cas. 157 and *Carlton Steamship Co. v. Castle Mail Packets Co.* [1897] Q.B.D. 485, I would observe that neither Bigham, J., nor Rigby, L.J., was dealing with a charterer's obligation to provide a cargo. The duty for breach of which the plaintiffs sue is not the mere general duty cast upon all contractors so to act as not to prevent the other party from carrying out the contract - a duty which may easily be overstated. Nor is it a mere duty to exercise reasonable diligence to find a cargo, though it is true enough that "ready" in the case of a cargo means "ready" in a reasonable sense. Nor is this a charter party without specified lay-days.

11. This suit was instituted on the 24th November 1923 and the written statement was filed on 6th February 1924. Para. 16 of the plaint contained a statement that the plaintiffs

on and after the said 3rd December 1920 and on and after the 7th March 1921 were at all times ready and willing to perform and kept in readiness the said steamship for the loading of the said cargoes etc.

12. Para. 11 of the written statement pleads with reference to this "It admits that the plaintiffs were ready and willing." By July 1925 after the *Baron Ardrossan* case had been decided on appeal the defendants were proposing to make a case to the effect that it was for the plaintiffs to apply for the allotment of a loading berth and that they had neglected to do so. They also suggested - without even asking leave to plead - that *Graham & Co.*, informed them that the *Zingara* would have to take her regular turn of. para. 20 (1) of the defendants petition of 15th July 1925.

13. Mr. Foster at the trial in November 1925 gave evidence that one or two days before 3rd December 1920 he asked Mr. Cruickshank of *Graham & Co.*, to put the *Zingara* into berth as soon as possible and was told that he could not put her in at once; she would have to take her turn. Mr. Foster seems to have thought that it was not a question of the defendants making up their mind: they would be told by *Graham & Co.* which steamer would go to a berth next. *Graham & Co.*, were purchasers of the defendants' coal for the other waiting vessels. As agents of the *Zingara* it would certainly be in their power to refuse to let the vessel go to a loading berth in spite of the charterer's desire that she should do so, but more extraordinary conduct could hardly be imputed to respectable agents and it is

simply incredible that so conclusive a reply to the plaintiffs' suit should not have been pleaded at once or even remarked upon in the correspondence as the defendants' plain justification.

Your own agents, to serve their private ends as buyers of coal from us, refused to let your ship be loaded when we wanted to load her and now you want us to pay you damages for the delay in loading.

14. That there was ever a question of refusing to let the Zingara come to a loading berth may I think safely be disbelieved. The defendants being apparently unable to do their ordinary duty as charterers of the Zingara as well as to fulfil their other engagements to Graham & Co, and being under some misapprehension of what their duty was, may have exercised no control over their own business and loaded whatever Graham & Co., put forward, but that is another matter and not matter of excuse to them. They are in no position to say that as against the plaintiffs they were entitled to rely on Graham & Co., sacrificing the plaintiffs' interests to their own desire to be supplied with coal. It makes all the difference whether the real effect and intention of anything said by Mr. Poster to Mr, Cruickshank was "Do you mind my putting another purchaser of coal in front of you?" or "as charterers we order the Zingara to a loading berth at once." But in all the circumstances I feel clear that the latter is not proved, and that the plaintiff's were not called upon to deal with such a case.

15. As regards the first voyage there was no shortage of waggons in December 1920. As regards the second voyage shortage of waggons does not matter since it is clear on the correspondence that the defendants could have brought coal in time from Messrs. Sircar and in any case it is not proved that the shortage was sudden or that in spite of it coal could not have been had at the dock from persons with a wider or a different area of supply.

16. Learned Counsel for the defendants, citing the Carlton case (5), threw out a suggestion in the course of his argument that it is not the duty of the charterer to point out a berth which is at the moment vacant but only to point out one that will be ready in a reasonable time and that the defendants cannot be liable to pay for detention of the vessel as from 4th December 1920 or 8th March 1921. In my judgment, however, the facts of this case and the terms in which this charter party makes provision as to lay-days, require that time be computed against the defendants as from the 4th December 1920 and the 8th March 1921 respectively.

17. In my opinion the appeal should be allowed with costs here and before the learned Judge and the case must be sent back with a declaration of the liability of the defendants in order that the amount to be recovered by the plaintiffs may be assessed.

18. It being stated that the parties have agreed that the costs before the learned Judge should include the costs of three counsels we make an order accordingly.

19. As regards the costs of this appeal we understand that there was an agreement contained in the letter of Messrs. Morgan and Co., dated the 18th of November 1926, and our order for costs of this appeal will be in accordance with the agreed terms.

C.C. Ghose, J.

20. (After setting out the facts and evidence his Lordship proceeded.) On behalf of the appellants it has been argued before us that there is an absolute obligation on the charterers, Under a charter party as in the present case, to have a cargo ready for being loaded into the vessel on the expiration of 24 hours notice of her arrival in port at the place of loading and that if there is a failure on the part of the charterers and delay results therefrom, they are liable for damages for detention, the contention being that the case is really covered by the judgment of the Privy Council in the case of Samuel Crawford Hogarth v. Cory Brothers & Co., Ltd. AIR 1926 P.C.121 delivered on the 26th July 1926, and by the judgments in the cases of Ardan Steamship Co., Ltd. v. Andrew Weir & Co. [1905] A.C. 501; Grant v. Coverdale [1884] 9 A.C. 470 and Bunge Y Born Co. v. H.A. Brightman & Co. [1925] A.C. 799. The appellants contend that as the defendant firm had no cargo ready they were not in a position to get the vessel into the coal dock and to get her berthed in proper time. In the second place, it is argued that notwithstanding Messrs. Graham and Company's letters of the 14th January 1921 and 28th March 1921, wherein they said that the lay-days were to commence from the 18th January 1921 as regards the first voyage, and the 27th March 1921 as regards the second voyage, the defendant firm, who had in fact no cargo ready for being loaded into the vessel when she arrived in port and was entered in the Customs House, cannot be heard to say that the lay-days did not run from the expiration of 24 hours after notice of arrival of the vessel in port. In the third place" it is argued that the learned Judge was in error in admitting in evidence Mr. Foster's account of the conversations referred to above and in allowing the defendant firm to contend that in the circumstances appearing on the evidence, the charterers were not liable because the case sought to be raised had been definitely disallowed" on the application for amendment of the written statement and also because it was not raised in the issues nor put forward till the plaintiff's" case had been closed. It is also argued that the plaintiffs would not be affected by any knowledge on the part of Messrs. Graham and Company, who were merely the agents of the vessel and not general agents of the plaintiffs, of the matters, assuming that they were true, referred to in the evidence of Mr. Poster. It is further argued that, in any event, such evidence was inadmissible under the provisions of Section 92 of the Indian Evidence Act and that, as a matter of fact, even if this evidence be received it is inconsistent with the other evidence on record and should not have been relied upon. Lastly, it is argued that the defendant firm's case is not covered by the exceptions in the charter-party and that, in the circumstances, the plaintiffs were entitled to succeed in their suit.

21. On behalf of the respondents it has been strenuously contended before us that the charterers had in fact and truth a continuous stream of coal at their disposal, but there was failure on the part of Messrs. Graham and Company, the agents of the vessel, in that the vessel was not ready to receive the cargo at the place in which cargoes of the agreed kind are usually loaded until the 13th January 1921 as regards the first voyage and until the 27th March 1921 as regards the second voyage; in other words, the contention is that it being common ground that coal could only have been loaded in the coal dock and nowhere else it was not enough for the plaintiffs to bring the vessel to the port of Calcutta, but that it was their duty to bring the vessel to the place where goods of this description could be shipped, namely, the coal dock. In the second place, it is contended that nothing really turned upon the defendant firm's acceptance of the notices of arrival of the Zingara, because all that it meant was that the ship was in a fit condition to receive the cargo, but it did not and could not possibly mean that the ship had been brought into the place where goods of this description could be shipped. In the third, place, it is argued that, on the evidence on record, there could not be any doubt whatsoever that at all material times the defendant firm had a complete cargo ready to be loaded into the Zingara and that if obstacles had not been thrown in, the way of the defendant firm in getting the Zingara berthed within a reasonable time of her arrival in port neither the fact of a station not being opened in time nor the coal wagons containing the defendant firm's coal not having been labelled for the Zingara could have prevented the Zingara from being loaded in terms of the charter party. Lastly, it is contended that on the evidence on record) it is evident that the parties contemplated that the vessel would be loaded in the shippers' turn i.e., turn of the people who actually loaded, and that if that was so there was no duty on the charterers to be ready with their cargo until the vessel was ready to be berthed.

22. Now in cases of this description, the principles of law applicable are well, settled and it is unnecessary in my opinion to make any detailed reference to the cases. The obligation of the parties must be decided by the terms of the charter-party, but there are certain-general principles governing cases of. this nature. It is the ship-owner's duty to bring the ship to the place named in the charter-party; and until he has done this the ship is not an arrived ship. and the lay-days do not commence to run. It is the duty of the charterer to have the cargo ready so that it may be put on board as soon as the vessel is brought to the place named in the charter-party. The result, therefore, is that the ship owner cannot claim damages for detention or demurrage until he has performed the obligation incumbent on him. If the shipowner has performed this obligation the charterer is liable if the cargo is not ready to be loaded in proper time unless he is protected by the exceptions in the charter-party. My conclusions on the evidence on record are as stated below, that the ship, owners in this case did perform their obligation but that the charterers did not perform their obligation in that they did not supply the cargo in proper time in terms of the charter-party.

23. In my view there is absolutely no substance whatsoever in the contention raised on behalf of the respondents that the Zingara could not be treated as an arrived ship because she had not been brought into the pleas where goods of this description could be shipped. Now in the first place, the charterers did not indicate the dock, place or wharf where the loading was to begin. The Zingara arrived in port on the 3rd December 1920 and was waiting at the mooring buoys in the stream and notice of readiness to load which was given by Messrs. Graham and Co. was accepted by the charterers. that :feeing so and having regard to the Port regulations, the ship-owners had done, in my opinion, all that was needful under the terms of the charter-party.

24. It appears from the evidence of Mr. Pyster that some time before a steamer actually arrives in port a provisional berthing list with probable dates thereon is made out in the office of the Port Commissioners and that the controlling factor which enables a vessel to come into the coal docks and get into a berth therein is that there must be at least 800 to 1000 tons of coal intended for the vessel either at the coal decks or on wagons and that the rest of the cargo to be loaded is waiting to coma down. In the case of the Zingara (first voyage) the first lot of coil intended for her did not arrive at the docks till the 31st December 1920, but it is said that the defendant firm had a continuous stream of coal at their disposal from the 4th December 1920 to the 22nd January 1921. By this is meant that the defendant firm were supplying coal to four vessels of which the agents were Messrs. Graham and Co. and that it would have been quite easy for the defendant firm to commence loading the Zingara from the 4th December 1920 if they had been allowed to do so. The actual dates of loading of the four vessels referred to above appear on page 28 of the paper book. It may be true in one sense that the defendant firm had a certain amount of coal at their disposal on the material dates; but it does not appear to be at all clear on the evidence that if the defendant firm had insisted on the Zingara being loaded in proper time in terms of the charter-party they would not have succeeded in getting her berthed in the coal dock within a reasonable time of her arrival in port. I think if the defendant firm were minded to load the Zingara immediately on her arrival they would have met with no obstruction at the hands of the Port authorities. I am not unmindful of the evidence of Mr. Foster in this connexion. In my view this evidence should not have been received at all by the learned Judge. If it was the defendant firm's contention that they as charterers were not going to be made liable for delay owing to the Zingara being made to take her turn as direated by Messrs. Graham and Co. there was nothing whatsoever to prevent the defendant firm saying so in the charter-party itself. In passing, it must be observed that there was no shortage of wagons in December 1920. The case sought to be set up at the trial was, in my opinion, inconsistent with the correspondence produced at the hearing and with the known and well-understood state of things obtaining at the docks at the material times. The position, therefore, in my opinion is, on the evidence, that if the defendant firm had exerted themselves they could have easily got the Zingara berthed within a reasonable time after her arrival in port.

It was the duty of the charterers to approach the dock authorities and get an allotment of a berth. They did not do so in proper time in terms of the contract between the parties.

25. As their Lordships of the Judicial Committee observed in the Baron Ardrossan case,

If a ship is prevented from getting into a loading berth owing to an obstacle created by the charterer or owing to a default of the charterer in performing his duty, then it is well-established that the ship-owner has done all that is needful to bring the ship to the loading place and that the charterer must pay for the subsequent delay.

26. I do not read the acceptance by the defendant firm of the notice of arrival in the way in which it was sought to be-contended on behalf of the respondents before us, nor can I deduce from the evidence that it was any part of the duty of Messrs. Graham and Co., the agents of the vessel, to get allotment of a berth. In the Baron Ardrossan case it is laid down by their Lordships of the Judicial Committee that the people who provide cargo as charterers are the people who are responsible for getting allotment of the berth in the coal dock. I do not think it is made out on the evidence that the agents of the vessel regulated the turn of the vessel in the berth or that the plaintiffs knew that the Zingara would have to take her turn in the order in which the defendant firm were loading the four vessels referred to on page 28 of the paper-book. In this connexion I may observe I am satisfied on the evidence that there was, in fact, no congestion in the port on the material dates because it is clear that certain other steamers were able to get away after loading within a reasonable time of the dates of their arrival.

27. As I understood the argument on behalf of the respondents, so far as the first voyage of the Zingara was concerned, no attempt was made to bring the case within the ambit of the exceptions mentioned in the charter-party. In my opinion, the defendant firm have failed to meet the plaintiffs' case as regards the first voyage of the Zingara; the case is in my opinion concluded by the judgments in the cases referred to above.

28. As regards the second voyage of the Zingara, learned Counsel on behalf of the respondents definitely stated that he did not rely on the exceptions. As stated above, the Zingara (second voyage) arrived in port on the 7th March 1921 and on that very day notice of readiness to load was given by Messrs. Graham and Co. to the defendant firm. The defendant firm opened a station for her on the 8th March 1921. On the 9th March the defendant firm informed the Collector of Customs that they were unable to secure wagons at their collieries for despatch of coal to the docks on account of the Zingara and they therefore requested that their authorization for coal might be cancelled.

29. It appears that the defendant firm had entered into an arrangement on the 9th March 1921 with Messrs. N.C. Sircar & Sons for supply of coal to the Zingara.

On the 10th March 1921 Messrs. N.C. Sircar & Sons obtained an authorization from the Collector of Customs, Calcutta, for 5000 tons of coal for the S.S. "Zingara." Messrs. Sircar & Sons had collieries, near more than one railway and it was thought that they would be in a position to supply the cargo quickly. As a matter of fact, however, the Zingara did not commence loading till the 27th March 1921. It is said that the delay was caused by the railways not supplying wagons to Messrs. Sircar and Sons collieries. The wagon shortage, if any, was not relied upon at the hearing before us; the contention was that the Zingara was loaded in her proper turn as regards the second voyage. The considerations which have influenced me in coming to the conclusion that the defendant firm had failed in their duty to provide cargo for the Zingara as regards her first voyage in proper time in terms of the charter-party apply equally to the second voyage.

30. I do not think that the plaintiffs are estopped from claiming damages for detention of the vessel because of the fact that the agents of the vessel had written on the 14th January and 28th March 1921 the letters referred to above relating to the running of lay-days. I think that the second contention put forward on behalf of the appellants notice in a previous part of this judgment is sound and that no estoppel really arises.

31. The result, therefore, is that, in my judgment, the plaintiffs are entitled to claim damages for detention of the vessel from the 4th December 1920 and the 8th March 1920.

32. For these reasons I agree with the learned Chief Justice in the order which he proposes to make.