(1965) 01 CAL CK 0022

In the Calcutta High Court

Case No : Suit No. 115 of 1959

Surendra (Overseas) P.R. Ltd. APPELLANT

Vs

Far East Enterprising Co. (H.K.) Ltd. RESPONDENT

Date of Decision : 20-01-1965

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Article 3
Carriage of Goods by Sea Rules — Rule 3, 8
New Found Land Carriage of Goods by Sea Act, 1932 — Section 3

Citation : (1966) 1 ILR (Cal) 255

Hon'ble Judges : A.N. Ray, J

Bench : Single Bench

Judgement

A.N. Ray, J.—The Plaintiff instituted this suit for the recovery of Rs. 42,078 and, in the alternative, an inquiry into damages and decree for the sum found due. The Plaintiff also claims interest on the said sum from January 30, 1958. The Plaintiff alleges that China National Metal Import Corporation, Shanghai Branch, of China, consigned 14,612 bundles of Mild Steel Rounds of different marks and numbers and weights to Calcutta. By a contract evidenced by Bill of Lading No. 1 dated December 9, 1957, issued and granted by the Defendant''s agent to the said consignor, the Defendant agreed to carry the said goods on board the Defendant''s ship "Sunnanbris" and to deliver the said goods to the order of the consignor or their assignees at Calcutta. The said China National Metal Import Corporation also consigned 19,650 bundles of Mild Steel Rounds of different marks, numbers and weights as evidenced by Bills of Lading Nos. 1, 2, 3, 4, and 5, all dated December 15, 1957, issued and granted by the Defendant''s agent to the consignor for carriage on board the Defendant''s ship "Sunnanbris" to be delivered to the consignor, or to the order of the consignor, at Calcutta. The Plaintiff alleges that by the said Bills of Lading the Defendant acknowledged to have shipped on board 34,227 bundles of Mild Steel Rounds to be safely and securely carried for delivery unto order or assigns. The vessel arrived at the port of Calcutta and discharged its cargo on January 30, 1958, The Defendant delivered 33,384 bundles. The Plaintiff claims Invoice value of 843 bundles amounting to Rs. 41,318 and proportionate expenses incurred for clearing the said goods amounting to Rs. 760. The Plaintiff alleges to be the owner of the goods and endorsee of the Bills of Lading and, in the alternative, to be the holder for value of the Bills of Lading.

2. The Defendant states that the Defendant issued Bills of Lading and makes no admission as to numbers, contents or weight of the bundles, or as to the marks. The Defendant denies to have made any acknowledgment as to the number of bundles shipped. The Defendant does not admit that the Bills of Lading were endorsed in favour of, or delivered to, the Bank of China, or that the Bank was the Plaintiff''s agent, or that the property in the goods passed to the Plaintiff. The Defendant also alleges that whatever quantities were shipped were landed from the vessel and the Defendant''s liability was discharged. The nature and extent of the defence will appear from the Issues raised at the trial.

3. The following Issues were framed at the trial:

1. Did the Defendant by the Bills of Lading for the said consignments acknowledge that the total quantity of 34,227 bundles of Mild Steel Rounds had been shipped on board the ship "Sunnanbris" as alleged ?

2(a) Were the said Bills of Lading, or any of them, duly endorsed in favour of the Bank of China ?

(b) If so, were or was such endorsements or endorsement made for valuable consideration ?

(c) Were the said Bills of Lading or any of them, delivered to the said Bank of China at Calcutta within the said jurisdiction ?

(d) In respect of the alleged transactions as aforesaid, was the said Bank of China acting as the Plaintiff''s agent ?

3. Did the property in the goods in the said consignments pass to the Plaintiff as alleged in paragraph 4 of the plaint ?

4(a) Did the Defendant fail to deliver 843 bundles or any other quantity out of the said consignments as alleged in paragraph 6 of the plaint?

(b) Did the Defendant, in breach of contract, contained in the said Bills of Lading, or in breach of any duty as common carriers, fail to carry 843 bundles or to deliver the same or any of them ?

(c) Has the Defendant converted the said 843 bundles, or any of them, to its own use ?

5(a) Was the Plaintiff at all material times the owner of the said goods ? Or

(b) Was the Plaintiff the endorsee of the said Bills of Lading ? Or

(c) Was the Plaintiff the holder for value of the said Bills of Lading ?

(d) Did the Plaintiff take delivery of 33,384 bundles of Mild Steel Rounds ?

6. Has the Plaintiff suffered damages to the extent of Rs. 42,078.00 nP. as alleged or in any other sum ?

7. Was any written notice of the alleged loss or the general nature of the alleged loss given to the Defendant or its agent at Calcutta before or at the time of the removal of the goods into the custody of the person entitled thereto or within 3 days thereafter ?

8(a) Did the Plaintiff make any claim within 8 days of the landing of the goods as provided in Clause 13 of the said Bills of Lading ?

(b) If not, what is the effect thereof ?

9. Has the Plaintiff any cause of action against the Defendant ?

10. To what reliefs, if any, is the Plaintiff entitled ?

4. On behalf of the Plaintiff there is the oral evidence of Narendra Nath Bidani, Accountant and Secretary of the Plaintiff, Harshadray Bhatt, who is in the employment of the Plaintiff and looks after the Import and Clearing Department, Mangma Tshering, who was in the employment of the Bank of China, Syed Sultan Basiruddin, who was Superintendent of Customs House in the year 1958, Priya Brata Ghosh, who was employed as Shed Master to the Commissioners for the Port of Calcutta and Kali Prasad Bhattacharji, who was employed by the Port Commissioners as Shed Writer in the year 1958. Another witness on behalf of the Plaintiff was Upadhyayala Venkataramane Murty who has been in the employment of the Plaintiff since the year 1956 and is the personal secretary of one of the Directors. Two other witnesses on behalf of the Plaintiff are Sudhir Chandra Biswas, who worked in the Accounts Department of the Commissioners for the Port of Calcutta, and Sohan Singh Bhasin who works as an Accountant of Machine Techno Sales Private Ltd. The Defendant''s witness is Benoy Krishna Chakravorty who works as Ship''s clerk in M. Ellias and Co., Stevedores.

5. The first contention on behalf of the Defendant is that the Plaintiff has not proved the number of bundles shipped and that the Bill of Lading does not constitute any acknowledgment of the number of bundles shipped. The Bill of Lading in the present case is in the following language:

Shipped, in apparent good order and condition, by China National Metals Import Corporation at Shanghai on board the ship SUNNANBRIS merchandise as described below (weight, measure, contents, quality and value unknown) for carriage to Calcutta (or as near thereto as she may safely get) and delivery to ORDER or assigns.

After those words there is a column containing the words "Particulars as furnished by the shipper". Thereafter, various columns are set out. Those columns are marks and numbers, number of packages, description of goods, gross weight, kilos, pounds and measurement. It is said on behalf of the Defendant that the notation in the Bill of Lading, weight, measure, contents, quality and value unknown indicates that there is no admission as to number of packages. Apart from the Bills of Lading, the Plaintiff has relied on the Mate''s Receipt, Export Manifest, Import Manifest, Out-turn Report and Letter of Call issued by the Customs Authorities. Counsel on behalf of the Defendant contended that the notation in the Bill of Lading "particulars as furnished by the shipper" taken with the words "weight, measure, contents, quality and value unknown" indicate, first, that the shipping company does not make any admission in number of packages and, secondly, all the particulars are as furnished by the shipper and, therefore, the shipping company does not make any admission. As to the other documents, Mate''s Receipt and Export and Import Manifests, it is contended on behalf of the shipping company that the Mate''s Receipt is earlier in point of time and, therefore, the shipping company is not bound by Mate''s Receipt, for the contractual rights are governed by the Bill of Lading. Reliance was placed by counsel for the Defendant on Carver''s Carriage of Goods by Sea, (tenth edition) at page 39 where it is said that when a Bill of Lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before the bill was given. The Bill of Lading is taken to be the expression of the contract under which everything has been done. It is contended on behalf of the Defendant that the Export and the Import Manifests are prepared on the basis of statements made by the Plaintiff and if there is any admission, it is not conclusive. With regard to Out-turn Report, it is said, on behalf of the Defendant, that the landing of goods was between January 30, and February 8, 1958, whereas the Out-turn Report is said to be not a contemporaneous document but the Tally Sheets are earlier and contemporaneous and, therefore, the Tally Sheets will prevail. It is also contended on behalf of the Defendant that the Letter of Call that was issued by the Customs Authorities was signed in the month of July, 1958 and the Steamer Agent''s explanation that "short landing was as per Port Commissioners report" did not amount to any admission but was merely an explanation stating the fact that the Port Commissioners'' Report stated there was short landing. It is also said that short landing will not prove the number of packages shipped.

6. Counsel on behalf of the Defendant relied on the unreported decision in Bharat Overseas Pr. Ltd. v. Madhablal and Co. (Pr.) Ltd. Unreported decision in Suit No. 2043 of 1957.

In that case the Bill of Lading was as follows:

Said to be marked and numbered as above. Weight, measure, nature, quality, contents and value, although mentioned in this Bill of Lading be considered as unknown to the Master unless expressly recognised and agreed to the contrary. Simple signature not to be considered as such agreement.

The Bill of Lading in that case contained several columns and those were "Marks, Numbers, Packing, Number of packages, Declaration of contents and Long tons". Under the column "Number of packages" there the total figure of 661 was given. It was contended in that case, on behalf of the Plaintiff, that the number of packages, namely 661, amounted to an admission of the entire shipment. It was contended by the Shipping Company in Bharat Overseas'' case that the words "Said to be marked and numbered" meant that they were said by the Shipper to be marked and numbered and the notation, weight, measure, nature and quality, contents and value mentioned in the Bill of Lading were according to the declaration of the Shipper and that the Shipping Company did not admit any such statement. That contention was upheld in Bharat Overseas'' case. Counsel for the Defendant contended that the Bill of Lading in the present case was in similar notation, namely, that weight, measure, contents, quality and value were said by the Bill of Lading to be unknown.

7. Counsel for the Plaintiff relied on the unreported decision dated June 26, 1964 in Pannalal Kishanlal v. Osaka Shosen Kaisha Unreported decision in Suit No. 889 of 1958. In that case the Bill of Lading contained the words as follows:

Shipped on board by the shipper hereinafter named, the goods or packages said to contain goods hereinafter mentioned, in apparent good order and condition.

Across the particulars set out in the Bill of Lading there was a notation in Pannalal''s case as follows:

Ship not responsible for cover torn, short of weight and or any condition of contents.

Clause 7 of the Bill of Lading in Pannalal''s case stated that the carrier should not be concluded as to the correctness of marks, number, quantity, weight, gauge, measurement, contents, nature, quality or value.

8. This question was considered by Viscount Reading C.J. in New Chinese Antimony Company Ltd. v. Ocean Steamship Company Ltd. (1917) 2 K.B. 664. In that case the Bill of Lading contained the words of notation "A quantity said to be 937 tons" and there was a further notation "weight, measurement, contents and value (except for the purpose of estimating freight) unknown." It was held that the Bill of Lading was not prima facie evidence of the quantity of ore shipped. Viscount Reading C.J. said that the true effect of the Bill of Lading in that case was that the words "weight unknown" had the effect of a statement by the shipowners'' agent that he received a quantity of ore which the Shippers'' representative said weighed 937 tons but which the Shipowners'' agent did not accept as being of that weight. The ratio in the New Chinese Antimony Company Ltd. case was whether there was any admission with regard to weight and the Bill of Lading contained the notation that weight was unknown. In the case of lessel v. Bath L.R. 2 Ex. 267, Marten B. said that the person signing the Bill of Lading, by signing for the amount with this qualification "weight, contents and value unknown", merely meant to say that the weight was represented to be so

much but that he had no knowledge of the matter.

9. It appears that the Bill of Lading usually contains two forms of notations. First, weight, value and contents unknown, Second, quality and quantity unknown. Insertion of such a notation in the Bill of Lading repudiates the liability of the shipowner for any description of weight or contents or of quality or quantity. The language of the Bill of Lading is usually of some effect in qualifying admission in the Bill of Lading. It was contended by counsel for the Defendant that in the present case, the Carriage of Goods Act did not apply and, even if it applied, there was no evidence of demand by the Shipper to state the quantity or weight.

10. The true character of a Bill of Lading containing such notations came up for consideration in the recent decision of the Judicial Committee in the case of Attorney-General of Ceylon v. Scindia Steam Navigation Co. Ltd. 1962 A.C. 60 : (1961) 3 All. E.R. 684. The Bill of Lading in the Scindia Steam Navigation Co''s case was subject to condition "Number and Contents I. Weight, contents and value when shipped unknown." A question arose in that case as to whether a certain number of packages were proved to be shipped and not delivered. Their Lordships considered that though the statements in the Bills of Lading as to the number of bags shipped did not constitute a conclusive evidence as against the shipowner, they formed strong prima facie evidence that the stated number of bags were shipped, unless there was some provision in the Bill of Lading which precluded that result. The condition in the terms weight, contents and value when shipped unknown was interpreted to mean that in sign ing a Bill of Lading, acknowledging the receipt of a number of bags, there was a disclaimer of knowledge in regard to the weight or contents or value of such bags and there was, however, no disclaimer as to the number of bags. The New Chinese Antimony case (Supra) was referred to by the Judicial Committee in the Scindia Navigation Co. (Supra) case and it was held that the notation in the New Chinese Antimony case (Supra) viz. "weight, measurement, contents and value (except for the purpose of estimating freight) unknown" did not amount to prima facie evidence of the quantity of ore shipped and that in an action against the shipowners for short delivery, the onus was on the Plaintiff for proving that 937 tons had in fact been shipped.

11. Reference may be made to the case of Hogarth Shipping Co. Ltd. v. Blyth, Greene, Jourdain and Co. Ltd. (1917) 2 K.B. 534, where a Bill of Lading for a specified number of bags of sugar was with the notation "weight, measure, quality, contents and value unknown." It was held by Lush J. that the Bill of Lading was conclusive only as to the number of bags in the sense of skins or receptacles and not as to their contents. It was pointed in Hogarth Shipping Co''s case that if a certain number of bags had been lost and if one had to ascertain what was in the bags that were lost, then as a matter of evidence, one would almost necessarily infer that the lost bags were bags containing similar goods to those which were not lost and that finding was because of notation in the Bill of Lading that the goods were shipped in apparent good order and condition.

12. In, Smith and Co. v. Bedouin Steam Navigation Co. 1896 A.C. 76, the Bill of Lading did not contain any words of limitation regarding quality or quantity or contents of the shipment. In that context Lord Halsbury said that the cardinal fact was that the person properly appointed for the purpose of checking the receipt of the goods had given a receipt in which he had acknowledged, on behalf of the person by whom he was employed, that those goods were received. If that fact was once established, it became the duty of those who attempted to get rid of the effect of that fact to give some evidence from which fact it should be inferred that the goods never were on board at all. Therefore, if there be any acknowledgment as to shipment of the number of bags, then, the shipowners would be under obligation to deliver the full number of bags.

13. In the light of the several decisions to which reference has been made, I am of opinion that the notation in the Bills of Lading in the present case, "weight, measure, contents, quality and value unknown" as will appear from the several acknowledgments referred to weight kilos or pounds or measurement and it can be stated that in the present case the column as to measurement is nil. It was contended by counsel for the Defendant that measurement, in the present case, would mean number of packages. In my opinion, there is no substance in that contention. A reference to the Bill of Lading would show that measurement and number are totally distinct and separate matters. There is a separate column for number of packages and there is another for acknowledgment for measurement. In the present case, the column for number of packages is filled up whereas the column for measurement does not contain any endorsement. Therefore, it is, in my opinion, established that weight and measurement do not refer to number of packages. The other three matters dealt with in the Bill of Lading are contents, quality and value. In my opinion, none of these three kinds of repudiation of liability envisages number. Number of packages is dealt with separately to marks, number, description, weight and measurement. I am of opinion that there is no disclaimer as to number of packages in the present case. I am, therefore, of opinion that the Bill of Lading contains an admission as to the number of packages shipped.

14. I shall now deal with the contention as to whether Carriage of Goods by Sea Act applies. But, assuming it applies, I am unable to accept the contention in the present case that there is no evidence for insertion of number and quantity in accordance with the Schedule to the Carriage of Goods by Sea Act. The Judicial Committee observed in the case of Attorney-General of Ceylon v. Scindia Steam Navigation Co. (Supra) that although there was no evidence in the Ceylon case that any demand had been made for the issue of Bills of Lading within Rule 3, Article III of the Schedule to the Indian Carriage of Goods by Sea Act, 1925, yet the statements in the Bill of Lading as to the number of bags shipped were strong prima facie evidence (though not conclusive evidence) that the stated number of bags had, in fact, been shipped. As was said in Smith Co. v. Bedouin Steam Navigation Co. (Supra) that once there was prima facie evidence, it would have to be displaced by showing that the goods, or some of them, were never

actually put on board and that would require very satisfactory evidence on the part of the shipowner.

15. Apart from the Bill of Lading, I am of opinion that the facts in the present case are sufficient to aid the Plaintiff in proving the number of bundles shipped. The contention on behalf of the Defendant that the other documents are not to be taken as admission or that they are not conclusive because the entire relationship between the parties is governed by the Bill of Lading, is unacceptable. I am unable to accept the contention on behalf of the Defendant that the Mate''s Receipt is not an admission. The Bill of Lading contains terms by which the shipowner repudiates liability. It is true that the Bill of Lading and its provisions must be considered to relate back, as has been said by Carver in Carriage of Goods by Sea Act, (10th Ed.), 39. The provisions of the Bill of Lading are different to admissions made by a shipping company in other documents. The Mate''s Receipt in the present case is to be found at p. 265(a) [Ex. D]. The Mate''s Receipt states the number of bundles received on board. Only one Mate''s Receipt has been disclosed and other Mate''s Receipts have not been disclosed. Counsel for the Plaintiff, in my view, rightly contended that adverse inference should be drawn from the non-production of other Mate''s Receipts and an inference should be made that if other Mate''s Receipts had been produced, they would have shown the same state of affairs as is evidenced by the Mate''s Receipt dated December 6, 1957, in the present case. The real character of a Mate''s Receipt is that statements in the Mate''s Receipts are not conclusive against the shipowner but they throw on him a burden of disproving them [See Scrutton on Charter Parties, 7th Ed., 154 and the case cited there Biddulph v. Bingham (1874) 30 L.T. 30]. The fact that the Mate''s Receipt is dated December 6, 1957 and that the Bill of Lading is dated December 9, 1957 does not, in my opinion, denude the Mate''s Receipts of the admission made.

16. Counsel for the Plaintiff, in my view, rightly relied on the Import and Export Manifests in the present case. The Export Manifest from Tsinkiang is to be found at pp. 271 and 272. In respect of shippers, China National Metals Import Corporation, various bundles are enumerated and I am told by Counsel for the Plaintiff that five Bills of Lading, as will appear in the Export Manifest at pp. 271 and 272, are for 19,615. That is a matter of calculation. The evidence is already there. Again, the Export Manifest at p. 279A will show the number of packages as 35,491 consisting of Mild Steel Rounds and general cargo. The Plaintiff also relied on the Import Manifest which will appear at p. 298 of Ex. D. There, again, the number of bundles will appear in Line Nos. 1, 2, 3, 4 and 5. Again, at p. 299 in respect of line No. 16, there will appear several bundles of Mild Steel Rounds. In my opinion, the Plaintiff is right in relying on these documents as containing admission by the shipping company of the number of bundles received on board. I am unable to accept the contention on behalf of the shipping company that the Export and the Import Manifests should not be conclusive or should not be considered as pieces of admission because the company relied only on the statement of the shipper. There is no direct evidence to that effect. No one from

the shipping company has come and explained any of the Manifests on the basis that details were given because they appeared on the Bills of Lading. Further, even if the shipping company followed that and even if the shipping company prepared the Manifest by reference to the numbers given by the shipper, these documents do not contain any repudiation of liability. The Bill of Lading is a special document. These pieces of documentary evidence are not couched with any words of limitation of liability or of insertion of any clause that they are not to be treated as pieces of admission of any evidence against the shipping company. These documents are to be construed as ordinary documents prepared by the shipping company.

17. The Plaintiff relied on the Letter of Call, being Ex. E. The Letter of Call is a document issued by the Customs Authorities requiring the shipping company to explain short landing. The contention on behalf of the Defendant that the statement by the shipping company''s agent as to short landing was as per Port Commissioners'' Report and was not an admission is, in my opinion, unacceptable. If the shipping company did not accept the Port Commissioners'' Report, the shipping company was at liberty to state that. To read the explanation in the Letter of Call, Ex. E, in the manner contended for by Counsel for the Defendant that it is not a piece of admission is, in my opinion, misreading the character of the explanation. There is an acceptance by the shipping company of the short landing. In this connection reference may be made to the Out-turn Reports, being Exts. A and B. Ex. A is Port Commissioners'' copy and Ex. B is the copy in possession of the shipping company. After the receipt of the Out-turn Report there was no occasion for any supplementary Out-turn Report. There does not appear to be any evidence that the Out-turn Report is incorrect.

18. Short landing Certificate (Ex. C). Out-turn Reports (Exts. A and B), Letter of Call (Ex. E) and the Defendant''s letter dated July 17, 1958 are relied on by the Plaintiff as documents to prove that there was shortage of delivery. It appears from the evidence of Kali Prasad Bhattacharji and Sudhir Chandra Biswas, as also from Exts. L, X, Y and Z, that the original documents have been destroyed. Counsel for the Defendant submitted, in course of argument, that I should accept the evidence of the loss of originals. What was contended on behalf of the Defendant was that the Plaintiff should have made attempts to preserve the originals. The Plaintiff may not have been correctly advised as to the preservation of proper materials and records. I have had occasion to comment, in similar suits, on the conduct of parties in regard to the preservation of documents which may be required at the trial in such cases. If the documents have been destroyed, as I hold in the present case, I am of opinion that the documents on which the Plaintiff relies show that there has been short landing of goods. The Defendant''s letter dated July 17, 1958, supports the Plaintiff''s contention that the Plaintiff never questioned the correctness of Port Commissioners'' Out-turn Reports. The shipping company relied on their Tally Sheets. Port Commissioners'' Tally Sheets show that the number of goods landed was 27,142, whereas the number shipped was 34,227, and that there was no

accounting of 7,085 pieces. The evidence of Priya Brata Ghosh is that there is possibility of landing of goods being missed in the Tally Sheets. In the present case, I am of opinion that in the facts and circumstances, Port Commissioners'' Tally Sheets missed landing of several quantities. The shipping company''s Tally Sheets, on the other hand, show that the entire quantity has been landed. The shipping company on July 17, 1958 and September 2, 1958 wrote that they were investigating the whereabouts of the alleged missing bundles and that the Plaintiff''s claim was premature, and on December 10, 1958 the shipping company repudiated any liability because Stevedores'' Tallies showed full discharge. Formal proof of Stevedores'' Tallies was dispensed with. Benoy Krishna Chakravorty said that he supervised the work of the Tally Clerks, and he said that none of the Tally Clerks could be found. In cross-examination, it was put to the shipping company''s witness as to whether there was anything to show that he checked the Tally Sheets. The witness said that there was no mention in the documents that he checked but it was his duty to do so. It was also put to the shipping company''s witness that the mode of Port Commissioner''s Tally Sheets differed from the mode employed by the shipping company''s stevedores. In Q. 34, the shipping company''s witness said that he did not check the Tally actually with the goods landed in the Port Commissioners'' Sheet. I am unable to accept the evidence of the shipping company''s witness that there is proof of accuracy of Tally Sheets. Documents do not prove themselves. The contents require to be proved. In the present case I am unable to hold that contents of Tally Sheets have been proved. On the contrary, the accuracy of the Tally Sheets is repelled by the Out-turn Reports (Exts. A and B), Short Landing Certificate (Ex. C) and Letter of Call (Ex. E).

19. It was contended on behalf of the Defendant that Priya Brata Ghosh said that posting in the Manifest was done from Tally Sheets and, therefore, Tally Sheets were the primary source. I have already said that I accept the evidence of Priya Brata Ghosh that the actual landing may have been missed in the Tally Sheets prepared by the Port Commissioners. The other contention on behalf of the shipping company was that the Plaintiff and the bank would have records to show what goods had been received and they have not disclosed the same. The Plaintiff has relied on the several documents to which I have referred, and, in my opinion, the Plaintiff has proved short landing.

20. It was contended on behalf of the shipping company that the Plaintiff''s claim was incompetent by reason of Clause 13 of the Bill of Lading. Clause 13 is as follows:

No claim made in this Bill of Lading will be admitted unless made and properly attested within 8 days after the goods have been landed. The ship and owners shall in no case be liable for more than the first costs of the goods and charges at port of shipment, including freight if paid. All claims must be made at port of delivery.

The contentions founded on Clause 13 in the Bill of Lading are twofold, first, that claims must be preferred within 8 days and secondly, that the ship-owner will have no liability for anything more than the first cost of the goods. The soundness of the contentions advanced by the shipping company depends on whether the provisions of the Carriage of Goods By Sea Act, 1924 apply. It will appear in Clause 18 of the Bill of Lading as follows:

This contract wherever made is to be constructed and governed by English Law. This Bill of Lading is subject to the Provisions of the Carriage of Goods by Sea Act, 1924.

Counsel for the Defendant conceded that the contract would be governed by English Law but he contended that the Carriage of Goods by Sea Act, 1924 would not apply in the present case because that Act applies only for carriage from a port in Great Britain or Northern Ireland to any port in or outside Great Britain or Northern Ireland and that the present case did not come within that qualification. As to what English Law is, Counsel for the Defendant relied on the statement in Carver''s Carriage of Goods by Sea, (10th Ed.) at p. 19. The contention on behalf of the Defendant is that under English Common Law, a shipowner receiving goods to be carried forward is to carry and deliver the goods in safety, answering for all loss and damage which may happen to them while they are in his hands as carrier and unless that has been caused by some act of God, or of the King''s enemies or by some defect or infirmity of the goods themselves, or their packages, or through a voluntary sacrifice for the general safety. Under the English Common Law, those exceptions are not to excuse the shipowner if he has not been reasonably careful to avoid or guard against the cause of loss, or damage ; or has not with it after a departure from the proper course of the voyage; or, if the loss or damage has been due to some unfitness of the ship to receive the cargo, or to unseaworthiness which existed when she commenced her voyage. Therefore, it is contended that this being the English Common Law, in the absence of express contract-and there being express contract in the present case-that claim is to be preferred within 8 days and that the shipowner will, in no event, be liable for more than the first cost, the Plaintiff is not entitled to any relief.

21. Counsel for the Defendant relied on the decision of the Judicial Committee in Vita Food Products, Incorporated v. Units Shipping Company, Limited 1939 AC 277, in support of the contention that Carriage of Goods by Sea Act, 1924 does not apply in the present case. In the Vita Food Products case, the Newfoundland Carriage of Goods by Sea Act, 1932 incorporated the Hague Rules, subject to certain modifications, and gave them the force of law and u/s 3 of the Newfoundland Act every Bill of Lading was to contain an express statement that it was to have effect subject to the provisions of the rules as expressed in that Act. Goods were shipped in Newfoundland under Bills of Lading which did not contain the statement required by Section 3 of the Newfoundland Carriage of Goods by Sea Act, 1932, but the Bills of Lading provided for exemption from liability for damage due to negligence of the shipowners'' servants, and contained

a clause that the contracts would be governed by English law. An action was brought in Nova Scotia against the shipowner in respect of damage to the goods. The shipowner pleaded exceptions under the contract and it was held that the provisions of Section 3 of the Newfoundland Carriage of Goods by Sea Act were directory and not mandatory and that failure to obey the directions did not make the contract illegal. Lord Wright said in the Vita Food Products case 1939 AC 277 that it would have to be determined as to what would be the proper law of the Contract and, in that particular case, the express words of the Bills of Lading were to receive effect, with the result that the contract was governed by English law. The intention of the parties will be ascertained by the intention expressed in the contract which is conclusive. [See Rex v. International Trustee for etc. Bondholders A.G. 1937 A.C. 500]. Lord Wright further said that where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of the public policy. In the Vita Food Products 1939 AC 277 case the question arose as to whether reference to English law would have the effect of rendering the Bills of Lading illegal by the Newfoundland law. It was held that there was no ground for holding that the Newfoundland law nullified Bills of Lading in that case. Section 3 of the Newfoundland Carriage of Goods by Sea Act was held to be directory.

22. Counsel for the Plaintiff, on the other hand, relied on the decision of the House of Lords in Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. (1958) 1 All. E.R. 725 (731) reported in 1958, 1 A.E.R. 725, and on the observation appearing at p. 731 of the report. In Adamastos Shipping Co.''s (1958) 1 All. E.R. 725 (731) case an oil tanker was chartered and a charter-party incorporated the U.S. "Paramount Clause", which was attached to the charter-party and was in terms as follows:

This Bill of Lading shall have effect subject to... the Carriage of Goods by Sea Act of the United States.... which shall be deemed to be incorporated herein... If any term of this Bill of Lading be deemed repugnant to the said Act to any extent, such term shall be void to that extent, but no further.

Section 5 of the United States Act provided that the Act should not be applicable to charter-parties and Section limited the scope of the Act to "contracts for carriage of goods by sea to or from parts of the United States in foreign trade." It was held on the true construction of the charter-party that the Paramount Clause was incorporated in the contract, and accordingly the words "Bill of Lading" in that clause should be rejected as falsa demonstration and the reference should be read as referring to the charter-party.

23. I am unable to accept the contention on behalf of the Defendant Shipping Company that because there is a provision in the Carriage of Goods by Sea Act that the rules shall have effect in relation to, and in connection with, the Carriage

of Goods by Sea in ships carrying goods from any port in Great Britain to any other port in or outside Great Britain, that Act or the provisions of the English Act are not incorporated in the present case. The blue pencil test will have the effect of striking out a portion of the contract. The intention of the parties is expressed in the terms written in the contract. The application of the provisions of the Act does not render any transaction illegal. The parties were well aware of what the provisions of the Act were. The Carriage of Goods by Sea Act made important alterations in the common law rights and liabilities of shipowners but the rules of common law remain applicable except in so far as they are expressly modified by the Act. Thus, proof of shipment of cargo in good condition and delivery in damaged condition, places upon the shipowner the burden of proving that the case falls within one of the immunities conferred upon him by the Act and the Rules. The principal changes effected by the rules and provisions are that the rules contain certain exceptions and stipulations in favour of the shipowner which constitute his maximum protection.

24. In the recent Supreme Court decision in The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar, question arose as to whether the clause that the carrier and the shipper shall be discharged from liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered was valid. The clause was decided in terms of Carriage of Goods by Sea Act, 1925, Schedule, Article 3, para. 8. The Carriage of Goods by Sea Act, 1925 is in the same language as the English Carriage of Goods by Sea Act, 1924. It was held by the Supreme Court that the clause in that case sought to lessen otherwise what is provided in the Rules in the Schedule to be the liability of the shipper or carrier for loss or damage to the goods or in connection with goods caused by the failure to deliver and, therefore, the stipulation was null and void. If the Carriage of Goods by Sea Act applies in the present case, it is indisputable that Clause 13 is null and void. No argument has been assigned that if the Carriage of Goods by Sea Act, 1924 applies, the clause is yet valid.

25. In my opinion, the true effect of Clause 18 of the Bill of Lading in the present case is that the parties have stipulated that English Law will apply wherever the contract is made. To carve out the applicability of Carriage of Goods by Sea Act, 1924 is to strike out an express term of the contract. The fact that the Carriage of Goods by Sea Act applies to every carriage from ports in Great Britain to ports in or outside Great Britain, is not an aspect which can control or delimit the intention of the parties that the provisions of the Act are made applicable in the present contract. It is perfectly legal between the parties to enter into a contract as they please, provided it is not illegal or opposed to public policy. It is not contended that applicability of Carriage of Goods by Sea Act is illegal or opposed to public policy. What is in effect the intention of the parties is that instead of incorporating the provisions of Carriage of Goods by Sea Act clause by clause, the parties have embodied the provisions of the Act as a part of their contract. The provisions of the statute are engrafted on to the contract as a part and

parcel of the contract. I am, therefore, of opinion that the Carriage of Goods by Sea Act and its provisions including Schedules and Rules apply and in view of that I am of opinion that Clause 13 in the present case is null and void in so far as it at tempts to lesson the liability of the Shipping Company by stipulating that no claim would be admitted unless it is made within 8 days.

26. Counsel for the Defendant relied on the decision of the Judicial Committee in Charles Moore and Berry Moore v. David Harris 1876 A.C. 318. A stipulation of the nature of Clause 13 in the Bill of Lading in the present case was enforced in 1876 A.C. 318. The decision of the Supreme Court repels in the present case the contention of the Shipping Company. Counsel for the Defendant also relied on the decision in Andrew Mantoura and Sons v. David 32 Com. Cases 1 in support of the similar contention that Clause 13 is enforceable. The question there was whether a clause that a claim would be admissible when brought into writing within eight days of the date of discharge operated to protect the Shipping Company. This decision does not take into consideration the application of Carriage of Goods by Sea Act, 1924.

27. It was contended on behalf of the Plaintiff that the Defendant was estopped from relying on Clause 13. It is said that the repudiation of liability by the Shipping Company was on December 10, 1958 on the ground that Stevedores'' Tallies showed that there was full discharge and that the Shipping Company never contended that the Plaintiff''s claim was not admissible because no claim had been made in compliance with Clause 13. Counsel for the Defendant contended that the Plaintiff had not pleaded waiver and it was not open to the Plaintiff to rely on any plea of waiver. Counsel for the Plaintiff, on the other hand, contended that the Plaintiff was raising the plea of estoppel. Estoppel is a rule of evidence. It was indicated when the case was opened that the Plaintiff would adopt the plea of estoppel. It is true that a person is competent to repudiate on more than one ground and may change the ground of repudiation of liability. [See British and Benningtons v. North Western Cachar Tea Co. 1923 A.C. 48]. The contention of the Plaintiff in the present case is, in my opinion, correct. At the time the pleadings commenced, the Shipping Company never gave any notice that the Shipping Company would rely on Clause 13. The defence is that the claim is not valid by reason of non-compliance with Clause 13. The Plaintiff was not called upon to plead estoppel at the time of presentation of the plaint. In the present case, the facts and circumstances, in my opinion, indicate that the Defendant, by repudiating ability on the ground of full discharge, represented to the plain that the Shipping Company was not relying on Clause 13. As I "have already indicated, it is open to them to change the ground of repudiation but, in the facts and circumstances of the present case, I am of opinion that the Shipping Company is estopped from doing so by reason of the facts indicated earlier.

28. It was contended on behalf of the Defendant that the Plaintiff did not have the right to sue, because, first, the Plaintiff has not proved that the property in

goods passed and, secondly, even if the property had passed, the Plaintiff did not prove that property had passed by endorsement of Bill of Lading. It is also said on behalf of the Defendant that it is unbelievable that Bank of China acted as agent because no arrangement was shown as to whether the Bank acted as agent or on its own rights. The Plaintiff relied on Ex. M dated August 12, 1957. This is a piece of evidence which shows that the goods were sold to the Plaintiff. There is intrinsic evidence in the Sale Note (Ex. M) that there was an Import Licence in favour of the Plaintiff. The Sale Note further stipulates that payment is to be by Letter of Credit. The Plaintiff also relied on Ex. S, the Invoice. Ex. S indicates that the goods had been shipped under Import Licence. The Invoice further indicates that payment is to be by draft at site through the Bank of China against Letter of Credit. The Plaintiff also relied on Ex. N and O being the Journal Voucher and the Bank Accounts. The Bill of Entry, being Ex. 2, shows that the goods are paid under a Letter of Credit. Reference at this stage may be made to the Export Manifest at pp. 271 and 272 where the consignees are stated to order, notify, Bank of China, Calcutta. In the case of Vita Food Products, Incorporated v. Unus Shipping Company Ltd. (Supra) the Bills of Lading were issued and provided for delivery in right apparent good order and condition at New York. It was stated that the Appellant, Vita Food Company Ltd., was to be treated as the owner at all material times by reason of that provision. In the present case, apart from the admission in the Export Manifest, to which I have referred, the Sale Note, and the Invoices and Exts. N, O and Ex. 2, all, in my opinion, constitute overwhelming and preponderant evidence that the Plaintiff was the owner of the goods and that the property in the goods passed.

29. The last contention on behalf of the Defendant is that the Plaintiff is not entitled to any amount in excess of the cost price and it was further contended that the value of 843 bundles was not proved because of the divergence of size and length. The evidence on behalf of the Plaintiff is that the invoice price will appear from Ex. S and the Plaintiff''s claim will also appear in Ex. T. It is the oral evidence of the Plaintiff''s witness Harshadrai Bhatt, that he visited the office of the Steamer Agent and it was never suggested that claim was inflated or wrong. His further evidence is that he verified the weight and took average weight. Harshadrai Bhatt and Narendra Nath Bidani both went to take delivery of the goods and they saw the goods. In the case of R. and W. Paul Ltd. v. Pauline (1920) 4 LR 221 the Plaintiff claimed damages for short delivery of 1106 sacks. It was found that the Shipping Company had failed to deliver 1106 sacks. The Plaintiff in that case was required to prove the weight that was shipped. It was held that the average weight of sacks delivered was to be taken and from that an approximate weight of 1106 sacks not delivered could be calculated. In the present case the evidence of Harshadrai Bhatt, in my opinion, shows that the calculation is correct and the Plaintiff has proved the value as well as the weight.

30. The contention on behalf of the shipping company, based on Clause 13, is that the Plaintiff is entitled only to first costs. The answer of the Plaintiff is, first, that such a clause has the effect of lessening the liability and is in violation of

provisions of Carriage of Goods by Sea Act and, secondly, the Plaintiff has given evidence that these were controlled goods and the Plaintiff has given evidence of controlled price and that the Plaintiff is entitled to damages at the port of delivery. The Plaintiff relies on the decision in Gangadin Mangturam v. Scindia Steam Navigation Co. Ltd. ILR (1950) Cal. 313. In that case the bill provided that no claim for undelivered goods or short delivery would be entertained unless made in writing within one month of arrival of the vessel and that the company was exempted from liability unless the value of each package, which exceeded Rs. 500, was declared in writing prior to shipment. That clause which lessened the liability was held to be bad. Counsel for the Plaintiff also relied on the Statement of Law in Scrutton on Charter Parties, (17 Ed.) at p. 418, that the effect of Rule 8 in Article 3 of Carriage of Goods by Sea Act is that a clause in a Bill of Lading which exempts the carrier from liability for which he would otherwise be liable under the Rule is totally void. It is said that the Plaintiff is entitled to damages at the port of delivery and, therefore, this clause which tends to limit it, is void. In my opinion, the contention is sound and correct. I have dealt with all the contentions advanced on behalf of the Defendant. Apart from these contentions no other argument was advanced. Issue No. 7 was abandoned by counsel for the Defendant. I am, therefore, of opinion that the Plaintiff is entitled to succeed. There will be a decree for Rs. 41,380 with interest on judgment and costs. Certified for two Counsel.

