

(1977) 02 KL CK 0009
In the High Court Of Kerala
Case No : A.S. No's. 192 and 267 of 1971

Syndicate Bank

APPELLANT

Vs

The Africana Co. (Private) Ltd. and Others

RESPONDENT

Date of Decision : 15-02-1977

Acts Referred:

Bills of Lading Act, 1856 — Section 1, 3
Carriage of Goods by Sea Act, 1925 — Article 3(4)

Citation : AIR 1977 Ker 103 : (1977) 1 ILR (Ker) 550

Hon'ble Judges : P. Subramanian Poti, J;P. Narayana Pillai, J;George Vadakkal, J

Bench : Full Bench

Advocate : V. Rama Shenoi and R. Ray Shenoi, for the Appellant;

Final Decision : Dismissed

Judgement

George Vadakkal, J.—One Mathew without delivery of goods for shipment obtained from D. W. 2 four bills of lading. He endorsed two of them to the appellant-Bank in A. S. No. 192 of 1971 for a consideration of Rs. 60,000/-, and the remaining two, to the appellant-Bank in the connected appeal for a consideration of Rs. 40,000/-. The banks advanced the amounts in good faith and unaware of non-delivery of goods to the carrier by their customer, the pretended shipper. D. W. 2 who signed the bills of lading, at the material time was the office manager of a Company doing business as agent of a shipping company. The question for consideration is as to whether the shipping company and the agent-company are liable on the four bills of lading, either for the price of the goods as prayed for in A. S. 192 of 1971 or for the amount advanced by the bank as sought for in the other case; are the companies estopped from proving the falsity of the bills of lading, as contended on behalf of the Banks.

2. The points of law that arise for examination are:-- (1) What rights, if any, a pretended consigner has on a false bill of lading; (2) Does the transferee of a false bill of lading acquire any greater right than the pretended shipper had.

3. A bill of lading is : (i) a receipt for goods entrusted for carriage by sea; (ii) evidence of the contract to carry them; and (iii) title deed for those goods. *Ellerman and Bucknall Steamship Co. Ltd. Vs. Sha Misrimal Bherajee*, . As a receipt it contains an admission of having received the goods mentioned therein. This admission, as any other admission, is not conclusive proof of the matter admitted, that is, of having received the goods, and can be proved to be erroneous, of course, subject to rules of estoppel. The pretended shipper knows that he has not delivered the goods and cannot, therefore, seek refuge under the doctrine of estoppel. In other words, as against the pretended shipper it can be proved that the admission contained in a bill of lading is false and erroneous, and that he did not in fact deliver goods. Once it is proved that goods were not entrusted by the shipper for carriage by sea, a bill of lading cannot also serve the purpose of evidence of the contract of carriage or of title deed.

4. Normally, a transferee acquires only such rights as the transferor has. Is the transferee of a bill of lading an exception to the above rule, is the next point for consideration. It should be borne in mind that the provisions of the Negotiable Instruments Act, 1881 are not attracted to a bill of lading since it is not a negotiable instrument as defined in Section 13 of the Act.

5. Section 1 of the Bills of Lading Act, 1856 which for the first time enabled an endorsee who is a stranger to the contract evidenced by the bill of lading and was therefore precluded by Law of Contracts from suing thereon, to sue on it, makes it clear that a consignee's or endorsee's right of suit on a bill of lading is "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. In other words a consignee or an endorsee gets only such rights as his consignor or endorser had in respect of the goods mentioned in the bill of lading. The endorsee, even if he be a bona fide transferee for value, under this provision takes the bill of lading only subject to any defects in the title of his transferor. This means that the essential feature of a Negotiable Instrument, namely, that such a transferee obtains a title free from equities is lacking so far as a bill of lading is concerned. No doubt, even prior to the Act Law Merchant recognised its negotiability, that is to say, that property in the goods in respect of which it was treated as the title deed was capable of being transferred by endorsement and delivery thereof, but this is only one of the features of a Negotiable Instrument. Discussing the corresponding provision in the English Bills of Lading Act, 1855 *Chanell J. in Compania Naviera Vasconzada v. Churchill & Sim. The Same v. Burton and Co.* (1906) 1 KB 237 said as follows:

"No doubt by the Bills of Lading Act the indorsee to whom the property has passed becomes a party to the contract made originally between the shipper and shipowner and evidenced by the bill of lading. But, as has been pointed out in more than one case, the contract must be construed in the same way between the original parties and the substituted parties, and it is necessary to see exactly the original contract is."

6. However, u/s 3 of the Bills of Lading Act, 1856 a bill of lading is conclusive evidence of shipment (or receipt) of goods mentioned therein as between the consignee or an endorsee for valuable consideration on the one hand, and "the master or other persons signing it" on the other. To this extent the consignee and an endorsee for valuable consideration are in a better position than the transferor, and only to this extent.

7. Under Article 3 (4) of the Rules relating to Bills of Lading (based on the Hague Rules) in the schedule to the Indian Carriage of Goods by Sea Act, 1925 a bill of lading is prime facie evidence of the carrier having received the goods mentioned therein. It may be that the carrier will have to prove not merely that goods may not have been received but that they were not. (See Scrutton on Charter Parties, 18th Edition page 113). However, still the carrier can, if he has not signed it, establish that the bill of lading was issued without receiving goods and exonerate himself from liability upon it. (See Att. Gen. of Ceylon v. Scinda Steam Navigation Co. 1962 AC 60).

8. Article 3 (4) in the schedule to the Indian Carriage of Goods by Sea Act. 1925 is identical to Article 3 (4) in the schedule to the English Carriage of Goods by Sea Act, 1924 which was repealed and re-enacted as Carriage of Goods by Sea Act, 1971. Article 3 (4) in the re-enacted statute also provides:--

".....However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith".

and thus makes the rule of prima facie evidence contained earlier in that clause, a rule of irrebuttable presumption, when the bill of lading has been transferred to a third party acting in good faith. No such rule is obtained in India.

9. It is in the light of the principles discussed above that the question of estoppel raised on behalf of the appellants has to be considered. In support of the argument that the companies are estopped from disputing the truth of the statements made by D. W. 2 in the bills of lading in question reliance is sought to be made on Silver v. Ocean Steamship Company Limited 1930 1 KB 416 417; C. & D. Sugar Co. v. Canadian National Steamships (AIR 1947 PC 40) ; The Ellerman and Bucknall Steamship Co. Ltd. Vs. Sha Bhagajee Sonmull and Others, and Ellerman and Bucknall Steamship Co. Ltd. Vs. Sha Misrimal Bherajee, . These cases concerned clean bills of lading containing the representation that "goods were received or shipped in apparent good order and condition". The rule was laid down in these cases that where the bad condition is discernible on a reasonable examination of the containers, the shipowners would be estopped from denying that the goods and packages were not received or shipped in good order and condition. In these cases the action was for damages for misrepresentation of fraudulent misrepresentation (deceit), no doubt by endorsees and against shipowners. It was pointed out in the first mentioned decision (432-33) that the statement is not "contractual" and the words are not "words of contract" in the sense of a promise or undertaking as held in

Compania Naviera Vasconzada v. Churchill Sim. The Same v. Burton and Co. (1906) 1 KB 237 (247). Here the suits are on the respective promises or undertaking to deliver goods and breach thereof. (See para. 10 of the plaint in A. S. 192 of 1971 and para. 5 of the plaint in the other case). Here, as stated by Channell J. in the passage extracted above "the Contract must be construed in the same way between the original parties and the substituted parties, and it is necessary to see exactly what the original contract is". No question of estoppel arises here since the cause of action is not any representation or misrepresentation but the promise to deliver the goods and failure to deliver them as promised.

10. As pointed out earlier the pretended shipper had no cause of action on the promise contained in the bills of lading in question to deliver goods or failure to deliver. If so, his transferee, for reasons already stated, also had none. As stated by Lord Russell of Killowen in AIR 1935 79 (Privy Council) :--

"Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement."

11. In this connection the learned counsel for the contesting respondents has a case that there is no sufficient pleading that it was relying on the statement made by D. W. 2 that goods were received that the appellant-Banks advanced the sums as aforesaid. The contention is founded on Rule 4 in Order VI of the Civil P. C. 1908, which provides that where a party relies on any misrepresentation and fraud particulars thereof have to be stated in the pleadings. It is contended that the pleadings in these cases would go to show that it was not relying on the statement in the bills of lading that goods have been received that the amounts were advanced by the Banks. The learned counsel for the contesting respondents drew our attention to the fact that as per the pleadings the pretended shipper had credit facilities with the Banks for discounting inland documentary bills and that the amounts were advanced, if not solely, at any rate, also on the faith of hundies and promissory notes executed by other persons and on the strength of mortgage by deposit of title deeds. It is also pointed out that the only pleading as regards estoppel is that contained in para. 10 of the plaint in O. S. No. 17 of 1965 and that contained in paragraph 6 of the plaint in the other case, wherein the plaintiff-banks say that the defendants 1 and 2 "are estopped from contending against the tenor of contract of carriage embodied in the bills of lading Issued by them". The learned counsel for the respondents forcefully

contends that these averments only go to show that the suits are based on the contract of carriage embodied in the bills of lading, which, no doubt, the plaintiffs say cannot be disputed by the companies. In other words the contention is that nowhere in the plaintiffs it is averred that the statement that the goods were received for shipment contained in the bills of lading has been made with the intention that the plaintiffs should act upon the faith of that statement, or they acted upon it to their prejudice.

12. It appears to us that there is much force in the contention as aforesaid. The pleadings on the whole are couched as if the cause of action is on the contract of carriage of goods evidenced by the bills of lading in question and that the contesting respondents were bound to deliver those goods and therefore they are liable in one case for the price of the goods and in the other for the amount advanced by the bank. As earlier stated, there is no cause of action founded on any representation or misrepresentation, which the plaintiffs did not upon to their prejudice.

13. Article 3, para. 3 of the Rules relating to Bills of Lading in the schedule to the Indian Carriage of Goods by Sea Act, 1925 directs that after receiving the goods and the shipper demanding for it, the carrier, his agent or the master shall issue a bill of lading showing the matters mentioned in Clauses (a) to (c) therein, Clause (a) being "the apparent order and condition of the goods", and para. 4 provides:--

"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with para 3 (a), (b) and (c)." The decisions relating to clean bills of lading discussed above proceed on the basis that since "apparent order and condition of the goods" are capable of physical verification by naked eyes on a reasonable examination of the goods, a statement that the goods received were so received in "apparent good order and condition" contained in the bill of lading would, despite Article 3 (4); estop the carrier from contending otherwise. It appears to us that this rule of estoppel would not extend, and could not be extended, to a statement regarding the factum of receipt of goods itself which fact is the very foundation of the contract of carriage of goods, especially when the statute says that it would constitute only prima facie evidence, that is to say, evidence "of first appearance" or evidence "on the first view", so as to make it conclusive evidence. At any rate where the enquiry is as to whether a contract of carriage of goods exists or not, neither a party to the bargain, nor, any one claiming under him is entitled to, taking shelter under the rule of estoppel, preclude the other party or one claiming under him from establishing that no such contract of carriage of goods exists for the reason that no goods were entrusted or received for carriage.

14. The learned counsel for the appellant-bank in A. S. 267 of 1971 raised a further contention seeking support thereto by Section 3 of the Bills of Lading Act, 1856. The submission is that D. W. 2 signed the bills of lading on behalf of the agent-company, which as a corporation cannot by itself sign those documents,

but has necessarily to sign them through a natural person. On that basis it is contended that the bills of lading in question have been signed by that company and therefore that company is precluded from denying that goods have been shipped or received for shipment, since u/s 3 of the Act the representation in the bills of lading that goods have been received shall be conclusive evidence of that fact as against any person signing the same. The argument is attractive but not supported by pleadings or evidence in the case. It was pointed out by Lord Justice Diplock in *Freeman v. Buckhurst Park Properties* 1964 1 All ER 630 CA as follows :--

"If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown : (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that he (the contractor) was induced by such representation to enter into the contract, i. e., that he in fact relied on it; and (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of the kind to the agent".

It is true that in the case of a Corporation any contract it enters into has to be signed by a natural person. The constitution of the corporation may empower any specific person to sign documents so as to bind the Corporation. Such person would then be not acting as agent of the Corporation in affixing the signature to documents for the Corporation. That would not be the case where the document is signed by another natural person such as one who is appointed as agent of the Corporation. It is not pleaded that D. W. 2 was a person who was authorised by the Memorandum or Articles of Association of the Company to sign for the Company. Even according to D. W. 2 he has issued the bill of lading only on the strength of the power of attorney granted to him by the Company. Hence he is only an agent and the bill of lading is thus signed only by the agent of the Corporation and not by the Corporation itself. We, therefore, do not consider this contention of counsel as of any force.

15. There was very lengthy discussion at the bar as to whether a false bill of lading issued by an agent would bind his principal. It appears to us that that question is not germane so far as the cases on hand are concerned. No doubt, the cases appear to have been fought out in the lower court on that ground, namely, that D. W. 2 had no authority to issue a bill of lading without receipt of goods. The lower court upheld that contention. An attempt was made to persuade us to hold that it is not so. We do not feel that we are called upon to

discuss or decide that question in these cases; suffice to point out that, as stated by Roskill J. in *Holy-Hatchinson v. Brayhead Ltd.* 1967 2 All ER 14 the decisions bearing on this branch of law of agent's ostensible authority for more than a century till the law was restated by Diplock L. J. in *Freeman v. Buckhurst Properties* 1964 1 All ER 630 CA) were, "by no means easy to reconcile", presumably because, as stated by Diplock L. J. in the second mentioned case, "this branch of law has developed pragmatically rather than logically, owing to the early history of the action of assumes it and the consequent absence of a general *jus quesitum tertii* in English Law."

The appeals fail and are dismissed. No costs here.