
(1960) 10 MAD CK 0014

In the Madras High Court

Case No : City Civil Court App. No's. 52 and 53 of 1957

The Ellerman and Bucknall Steamship Co. Ltd.

APPELLANT

Vs

Sha Bhagajee Sonmull and Others

RESPONDENT

Date of Decision : 21-10-1960

Acts Referred:

Citation : AIR 1961 Mad 442 : (1961) ILR (Mad) 632 : (1961) 74 LW 272 : (1961) 2 MLJ 97

Hon'ble Judges : Ramachandra Iyer, J;Rajagopalan, J

Bench : Division Bench

Advocate : King and Partridge, for the Appellant; V. Thyagarajan, B.A. Rajagopalan, V. Rajagopalachari and S. Ramiah, for the Respondent

Final Decision : Dismissed

Judgement

Ramachandra Iyer, J.—These appeals raise a question as to the liability of a shipowner for non-disclosure in the bill of lading of a fact

relating to the condition of the packages received by him for carriage by sea. The Ellerman and Bucknall Steamship Co. Ltd., whose local agents

are Messrs. Best and Co., Ltd., are the appellants in the two appeals, which arise out of the decree in two actions, O. S. Nos. 1135 and 1144 of

1935 (commenced on the original side of this court but later transferred to the City Civil Court, Madras).

The suits were instituted by the first respondent in each of the appeals for recovery of Rs. 26061-4-9 and Rs. 23248 respectively from the

Mercantile Bank of India (the second respondent) and the appellant. They were tried with a similar suit, O. S. No. 1134 of 1955, and a common

judgment was delivered. The first respondent in C. C. C. A. No. 52 of 1957 entered into two contracts respectively, dated 12-12-1950 and 19-

1-1931, with the British Mercantile Co., New York, for the purchase of fresh Monsanto Polystyrene Injection Moulding powder (not reground) in

granules packed in new fibre drums for Rs. 25000 and Rs. 12000.

The first respondent in C. C. C A. 53 of 1957 entered into three similar contracts with the same seller on 12-12-1950, 23-1-1951 and 25-1-

1951, for Rs. 13500, Rs. 13300 and Rs. 7300 respectively. In all the contracts the price was to be paid at New York by means of irrevocable

letters of credit, to be opened in favour of the seller, payable in full on presentation of the shipping documents. In accordance with the terms

stipulated, the buyers opened letters of credit with the Mercantile Bank of India Ltd., for the requisite amounts.

The Mercantile bank of India, which had no branch of its own at New York, arranged with the Bank of Montreal at that place to open on behalf

of the buyer, the letters of credit. Within the time stipulated in the contract the seller tendered to the appellant, for being carried by its steamer ""S.

S. City of Lucknow"", certain consignments alleged to contain polystyrene powder; the goods consigned were packed in re-used drums.

The mate's receipt, which was given on delivery of the goods by the shipper to the shipowner, described the packages as ""re-used drums"". It may

be noticed that the mate's receipt is a mere acknowledgement of receipt of goods by the shipowner; the contract of carriage will be contained only

in the bill of lading signed by the person who agrees to carry them; that is & document of title to the goods.

2. The seller, being evidently apprehensive that the description of the packages in the mate's receipt, if entered in the bills of lading, would not

facilitate his obtaining monies under the letters of credit, requested the appellant, the shipowner, to issue clean bills of lading by not mentioning

therein that the goods were consigned in re-used drums (as in the mate's receipt), but merely mentioning them as drums. The appellant acceded to

the request but it safeguarded itself by obtaining from the shipper letters of indemnity (Ex. A. 26 being typical of the rest), whereby the seller

agreed to indemnify the former against any loss etc., but that it may sustain by reason of clean bills of lading being issued, and issued such bills, the

relevant clauses therein stating:

Received in apparent good order and condition from the British Mercantile Co.,

Ltd., to be transported by the good Vessel City of Lucknow.

Total packages said to weigh 9920 Ibs. said to be marked and numbered as below....21 drums weighed 9920 Ibs."" (The above is contained in Ex.

A-7, one of the bills of lading issued by the appellant.)

Armed with such bills of lading, which did not disclose that the packing was either defective or was made in reused drums, the shipper had no

difficulty in negotiating them and drawing monies, \$5227 and \$2475 from the Montreal Bank under the various letters of credit. In due course, that

bank forwarded the bills of lading to the Mercantile Bank Ltd, Madras, who duly notified the buyer. The latter paid Rs. 38033-12-9 and RS.

33012-5-0 on various dates, and Wok delivery of the bills. The goods arrived in Madras on 13-4-1951. When the first consignment was opened,

it was found that it did not contain anything like Polystyrene powder, but coal dust and factory" shavings. As the fraud of the seller was found out

even at the beginning, the later payments to the bank were made by the buyer under protest. The contents of the other consignment were in no way

different.

3. The buyers, thereupon, commenced actions against the seller in the American courts, and were able to realise Rs. 10972-8-0 and Rs. 9764-1-0

respectively, in respect of the contracts forming the subject-matter of the two appeals.

4. The buyers then instituted the two suits, out of which, these appeals arise, for recovery of the balance (Rs. 26051-4-9 and Rs. 23248-8-0),

representing the loss sustained by them against the Mercantile Bank Ltd. and the shipowner, stating that the loss sustained by them was attributable

to the breach of duty committed by them. Subsequent to the institution of the suits, the respective buyers received from the seller Rs. 3981-14-0

and Rs. 3654-12-0 and due credit was given by the lower court for these sums.

According to the buyer, what was presented to the bank at New York were unclean bills of lading (it is unnecessary to refer to the circumstances

relied on in support of that plea), and the bank had no authority to negotiate and pay under the terms of the various letters of credit. It was,

therefore, claimed that the bank should be held liable to make good the loss sustained by the buyer. The case against the shipowner was that the

bills of lading issued were clean bills, which the banks were authorised to

negotiate.

It was stated that the shipowner, with the knowledge that the goods were defectively packed or that the packing was such that if described

correctly, it would not entitle the seller to clean bills of lading, issued such bills which enabled the latter to operate on the letters of credit, which,

otherwise, would not be possible; alternatively, it was said that the shipowner was guilty of not disclosing the true description of the condition of the

packages received for carriage, but On the contrary, making a statement in the bills of lading, as if they were received in apparent good order and

condition (while they were really not so), thus making false representations which resulted in a loss to the buyer, the ultimate assignee of the bills.

5. The claim of the buyer was contested by the bank as well as the shipowner. The former pleaded that they acted in strict conformity with the

letters of credit, the seller having presented clean bills of lading, on production of which they were bound to pay. The latter denied that it ever failed

to disclose the true facts to any one to whom they owed duty to make such disclosure, that the containers of the goods were sufficiently and rightly

described as drums and that, as the materials sent by the consignor had been duly delivered as received on board the ship, it had no further

responsibility in the matter.

6. The learned City Civil Judge did not accept the contention of the buyer that the bills of lading tendered to the bank were unclean bills; he held

that the bank had committed no breach of duty by negotiating such bills and paying the seller the amounts under the letters of credit, and that the

claim against it should fail. But, as regards the shipowner, he found that it did not correctly describe the goods in the bills of lading, but instead

deliberately described them as drums, with a view to facilitate the buyer to operate on the letters of credit, and that, if the correct description had

been given, the bills of lading would have turned out to be unclean bills of lading, and the bank would not have paid the drafts drawn by the buyer.

On that conclusion, decrees against the shipowner followed. Credit was given for the pay-merits subsequently received by the buyer from the

seller, and decrees were passed against the appellant in the two suits for Rs. 22079-6-9 and Rs. 19693-4-0. The shipowner has filed C.C.C.A.

Nos. 52 and 53 of 1957 against the aforesaid decrees. The buyer (the plaintiff)

has filed C. C. C. A. Nos. 60 and 59 of 1957 against the dismissal of the claim against the bank.

7. Before considering the various contentions urged in the appeals, it would be useful to refer to the system of payment to a seller by means of letters of credit which is of a comparatively recent origin.

8. In Cheshire and Fifoots Law of Contracts, 1956 Edn the evolution and the main features of a letter of credit are described at page 366 thus:

The course of international trade during and since the War of 1914 has opened a new gap between business requirements and legal mechanism.

The exporter has found himself confronted with peculiar difficulties. He may be dealing with a buyer whose credit is doubtful, or at least unknown:

he may be faced with the possibility of sharp fluctuations in the rate of exchange between the formation of the contract and the date of payment;

and, even if free from these peculiar anxieties, neither he nor the buyer may wish to see their capital frozen during the time which must necessarily

elapse before the goods, despatched from the place of manufacture, can be sold by the buyer in his own market: (The Kron-prinsessan Margarets

1921 1 AC 486 . To meet these difficulties it has become usual to finance international trade by what are called Bankers' Commercial credits.

From the lawyer's point of view, and reduced to its simplest terms, the device involves three separate transactions.

(1) A clause is inserted in the initial contract of sale, whereby the seller requires payment in a particular manner. The buyer is to ask his bank to open a credit in the seller's favour, which shall remain irrevocable for a given time.

(2) The buyer makes an agreement with his bank, whereby the bank undertakes to open such a credit in return for the buyer's promise to reimburse the bank, to pay a small commission and to give the bank a lien over the shipping documents.

(3) The buyer's bank notifies the seller that it has opened an irrevocable credit in his favour to be drawn on as soon as the seller presents the shipping documents.

9. Thus a letter of credit involves a mandate by the constituent (buyer), and an undertaking by a banker to meet drafts drawn under the credit by the beneficiary of the credit (e.g. the seller) in accordance with the conditions

laid down therein. The credit is designed to facilitate trade with foreign countries. There may be cases where the bank, with whom a constituent opens a letter of credit, has no office at the place where the credit is to be operated on, i.e., where payments are to be made under the contract. In such cases, the credit Opening bank, in it's turn, employs another bank which carries on business, or has a branch transacting business at that place as its agent for negotiating shipping documents and paying the beneficiary of the credit. The latter bank, known as the paying or intermediary bank, has ordinarily no privity of contract with the constituent who opens the letter of credit i.e., the buyer. In certain cases, the original bank itself opens a letter of credit with the paying bank. The relationship that exists between a buyer and banker is stated in Halsbury's Laws of England, Simond's Edn. Vol 2 at page 213 (para 399):

The buyer who, pursuant to his sales contract, instructs his banker to open a credit, undertakes to put the banker in funds, provided the documents against which the banker pays are what the buyer calls for. The banker is bound to apply the funds to the purpose to which they are appropriatedThe banker must comply rigidly with his instructions, and the same applies to the paying banker (if there be an intermediary banker) the latter being indemnified by the former if he complies strictly with the instructions. There is ordinarily no privity between, the buyer and the paying (intermediary banker).

The material portions of letters of credit in the instant case opened by the buyer, Ex. B-2, is a typical letter of credit stated:

Drafts are to be drawn at sight and accompanied by documents purporting to be full set, clean, freight paid, on board ocean bills of ladingI

agree that for the regularity or genuineness of the above documents you are not to be responsible if they are apparently in order.

Such a letter of credit would entitle the banker to pay only if clean bills of lading were produced. The immunity granted to the banker, where he

pays against documents in apparent Order, cannot obviously authorise a payment on presentation of an unclean bill of lading, as such a bill (as we

shall presently see) cannot be said to be in apparent order. It was accepted by learned counsel On both sides, for the purpose of the above

appeals, that what the seller presented were clean bills of lading. As we stated

earlier, the liability of the shipowner is rested On the basis that he issued a clean bill of lading, when the circumstances existing to his knowledge bound him to issue only an unclean one; that again rests on the assumption that, if the bill of lading had described the consignment as being in ""re-used drums"", it would be an unclean bill of lading.

10. Now what is a clean bill of lading? Broadly defined, it is one which contains nothing, in addition to its usual clauses, indicating any qualification of the condition of the goods, their packing or the liability of the shipowner. In Halsbury's Laws of England (Simond's Edn.) at page 218, it is stated;

It has not been decided what is a "clean" bill of lading but in English practice it is one which does not contain any reservation as to the apparent good order and condition of the goods Or the packing.

Serutton defines it in his book on Charter Parties and Bills of Lading 16th Edn. at page 175, note 1. as one ""in which there is nothing to qualify the admission that so many packages are shipped in good order and well conditioned."" In Carver's Carriage of Goods by Sea, 10th Edn. it is stated at page 66:

The general statement in the bill of lading that the goods have been shipped "in good order and condition" amounts (if it is unqualified) to an

admission by the shipowner that, so far as he and his agents had the opportunity of judging, the goods were so shipped. If there is no clause or

notation in the bill of lading modifying or qualifying the statement the goods were "shipped in good order and condition", the bill is known as a

clean bill of lading. Such an admission creates an estoppel as between the shipowner and an indorsee. Who, on the faith of that admission, has

become indorsee for value of the bill of lading"". Lord Wright observed in Canadian and Dominion Sugar Co. Ltd. v. Canadian National (West

Indies) Steamships Ltd., 1947 AC 46, that if the statement at the head of the bill ""Received in apparent good order and condition"" had stood by

itself, the bill would have been a ""clean"" bill of lading, an expression which meant at least in a context like that, that there was no clause or notation

modifying or qualifying the statement as to the condition of the goods.

11. A clean bill of lading, is, therefore, one that does not contain any reservation as to the apparent good order or condition of either the goods

themselves, or their packing (Per Salmon, J., *British Imex Industries v. Midland Bank*, 1958 1 All ER 264 . Therefore, a defect in packing, if noted

in a bill of lading, would render it an unclean bill.

12. The learned counsel for the buyer first contended that the mere fact that goods were packed in re-used drums would itself mean that they were

not properly packed, as re-used drums would not be as good as new ones and as fibre cases would wear out by use. From that, it was argued

that if the bill of lading disclosed that re-used drums were utilised for packing, that would by itself indicate defective Packing, with the result that

there would only be an unclean bill We cannot, however, agree with, such a broad statement of the position. In certain cases, used or seasoned

material would be more suited for packing than new and unused ones. In *Armstrong v. Allan Bros.*, (1892) 67 LT 417, linseed oil was packed in

old seasoned casks which were peculiarly suited to hold such oil. It was held that there was no defect in packing and that the ship-owner could

have given a clean bill of lading.

13. It was then contended that, as there was no specific denial in the written statement of the averment in the plaint that the goods had been

defectively packed, it must be taken that there was an implied admission of it. Para 9 of the plaint contained the following;

When the steamer in question arrived at Madras, the plaintiffs who had cleared the said documents wanted to take delivery of the goods and it

was discovered that the packing was defective and in re-used drums and the contents were coal dust instead of Fresh Monsanto Polystyrene

Injection Moulding powder in granules (not reground).

14. Paragraph 4 of the written statement which controverted the averments in paragraph 9 of the plaint, did not specifically deny the statement as

to the insufficiency of packing. The second defendant merely denied therein that they entered into any secret arrangement with regard to the goods

or containers, or that they failed to disclose true facts to anyone to whom they owed any duty of disclosure, or that they or their agents had at any

time admitted that any of the facts stated by them or their agents were untrue. It was also pointed out by reference to Ex. A. 46 to B. 48 that, at no

stage, was it the case of the appellant that packing was not defective.

On the other hand, Mr. O. T. G. Nambiar, the learned counsel appearing for the

shipowner, contended that the averments in the plaint should be read stating that the defect in packing was only by reason of re-used drums being employed for the purpose, and that they would not be held as implying two distinct heads of the condition of the goods, viz., (1) there was a defect in packing, and (2) re-used drums were used. We cannot, however, agree that the averments, could be so read; but we prefer not to rest our decision on any implied admission in the written statement.

15. Mr. Nambiar then contended that even if the words "re-used drums" had been used in the bill of lading, they would not derogate from the general words "received in apparent good order or condition" and that the document would have been what it was, namely, a clean bill of lading.

The learned counsel referred, in this connection to Art. 18 of the Uniform Customs, and Practice for Commercial Documentary Credits, Ex. B-

33, which states :

Clauses which do not expressly state that the goods or packing are unsatisfactory e. g., second hand cases "used drums" etc., could not be considered as making reservations as to the nature of packing".

The learned trial Judge before whom the same contention was raised rejected it, holding that the practice, evidenced by Ex. B. 33, would not

apply to the present case, as the letter of credit did not state anything about the regulation of the United States of America. We agree with him.

Further in the Law of Bankers' Commercial Credits, the 2nd Edn. by Cutteridge, the learned author, referring to the practice, observes, at page

79:

Unless a clause has a specific technical meaning which is recognised by all those, who use it or have to accept it--unless it is a term of art--it will

probably be judged in law by what it means in ordinary language as governed by its context

There is no evidence in the present case that the words "used cases", when used in connection with the condition of packing, will have no

significance whatsoever. The words, standing by themselves, would indicate that the material was not new. It is not the case of any party that used

drums were particularly suited for packing polystyrene powder. In (1892) 67 LT 417, to which case we have made reference earlier, there was a

consignment of linseed oil which was described in the mate's receipt as being

contained in "old casks".

The shipper wanted a dean receipt to he given, but the shipowner gave only a receipt with an endorsement that the oil was contained in "old

casks". The learned Judge held that the words, "old casks", prevented the mate's receipt from being a clean one. This conclusion was arrived at,

notwithstanding the fact that linseed oil was stated to have been always shipped in casks seasoned by having carried petroleum;. and that new

casks were unfit for that purpose. On the facts of the case, the learned Judge found that the casks in question were of the usual character, and in

sound condition and in every way entitled to a clean receipt.

That decision established two propositions (1) that, where the packing is good, it will be open to a shipowner to give a clean receipt without using

the word "old", notwithstanding the fact that old casks were used and (2) that, where the word "old" is used in the bill of lading or mate's receipt

with reference to the packages, it would be an unclean bill or receipt. It is not, however, the case of the shipowner that reused drums are

particularly suited for packing polystyrene powder, or that the packages were in such a sound condition that it, after exercising a judgment, granted

a clean bill of lading. On the other hand, evidence discloses that the clean bill was given at the request of the seller and after taking an indemnity

from him.

16. The question then is whether the use Of the word, "re-used drums", would have altered the character of the bill of Lading. That question can, in

the circumstances of this case, be best answered by as certain in what the parties themselves thought about it.

17. Side by side with the evolution of trade on the basis of letters of credit, the practice of obtaining clean bills of lading from a shipowner appears

to have developed. It is said that the universal practice of a banker is to decline to negotiate and pay on bills of lading, which are not clean, unless

he has express instructions therefor, or is willing to take a risk (see Law of Bankers' Commercial Credit by Gutteridge, 2nd Edn. p. 77). But a

consignor may not always be able to obtain clean bills of Lading, for external defects might exist in the goods (sometimes defects which might not

even affect, the carriage of the contents safely to the destination.)

International Commerce (occasioned by the prudence of the banker and the

necessities of the trader) evolved a method of getting over the difficulty. The shipowner was willing to oblige the shipper, and issue clean bills of lading in respect of consignments which would not be entitled to the issue of such bills, after taking an indemnity from the shipper for any loss he might sustain by reason thereof, thus enabling the latter to satisfy the terms of the letter of credit. Where the goods reach their destination without loss, there would be no difficulty: if they do not do so, the shipper would expose himself to liability to the consignee or his representative, though the loss might not be due to the fault of the shipowner, and, in case he pays any damage, he would have recourse against the shipper, who would be bound to indemnify. This practice has been referred to by Pearce, L. J. in *Brown Jenkins and Co. v. Percival Dalton (London) Ltd.*, 1957 2 QB 621 thus: In the last 20 years it has become customary in the short-sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a bona fide dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty where time is short. If the goods turn out to be faulty, the purchaser will have his recourse against the shipping owner, who will in turn recover under its indemnity from the shippers".

I; can readily be realised that it was this practice that was taken advantage of in the present; case. The seller was anxious to get money from the bank. It was in his interests (particularly having regard to his fraudulent object) that he should get a clean bill of lading, as otherwise he would not be able to get the money under the letter of credit. The goods were packed in re-used drums, as the mate's receipt showed. The seller must have thought that, if the same description was adopted in the bill of lading, it would not be a clean bill.

Otherwise, it is understandable why he should request the shipowner for a clean bill of lading and give an indemnity against loss. The shipowner, who must have been aware of the practice, evidently knew that omission of the word "re-used" was required to enable the seller to draw on the letter of credit. There was no need to take any indemnity if the omission of the word "re-used" was immaterial and would not expose the shipowner to any loss. Indeed, the indemnity letter expressly covers any loss which if may

sustain by reason of deleting the word "re-used" in the description of the drums.

It is obvious that the shipowner would not have deleted those words except for the letter of indemnity. It is plain, therefore, that, in the opinion of the shipper as well as the shipowner, the use of the word "re-used" would not make the bill of lading a clean one, so as to enable the seller to negotiate it freely. This consciousness of the parties can be taken as the best interpretation of the significance of the word, "reused" in a bill of lading. It follows that apart from the principle of the decision in (1892) 67 LT 417 the use of the word "re-used" in the bill of lading would have rendered it an unclean bill.

18. It was contended for the appellant (shipowner) that, when the bill of lading purported to describe the consignment as "drums" simpliciter, there was no misstatement, as "re-used drums" could still be called drums. The question, however, is not whether the mere use of the word "drums" would not apply to the packages. The bill of lading contains a statement that the goods were received on board in apparent good order and condition. We have pointed out that, if the words "re-used drums" had been used, the apparent good order would be qualified by those words, and the bill of lading would be rendered an unclean bill. In the circumstances of this case the omission of the material word was deliberate, and it enabled the seller to obtain monies under the letter of credit which he would not have been able to do otherwise.

19. Mr. O. T. G. Narnbiar then contended that the shipowner was under no duty, either under the statutory or common law, to give an accurate description of the goods.

20. To deal with this contention, it is necessary to digress a little on the duties of the banker, shipper and the shipowner. It is necessary also to consider the nature of the statements contained in a bill of lading. It is obvious that a banker, in whose favour a letter of credit is opened, owes a duty to his constituent to act strictly in accordance with the terms thereof. This is not any principle peculiar to the law of banking; an agent would owe such a duty to his principal.

Where, therefore, a beneficiary presents shipping documents and demands monies under a letter of credit, it will be the duty of the bank to

scrutinise the documents tendered, and see whether the instructions given by its constituent (e.g., the buyer who opens the credit) have been strictly

complied with. The bank would be bound to refuse to accept, or negotiate the shipping documents, Or pay the beneficiaries under the letter of

credit, unless the documents presented strictly conform to those covered by the instructions.

If for example, a letter of credit authorises the payment on presentation of clean bills of lading, it would not be open to the bank to pay against an

unclean bill. A bank, contravening the instructions or committing a default in that; respect by paying the seller, would not be entitled to recover that

amount from its constituent, it will forfeit also any commission payable by the constituent therefor. A beneficiary under the letter of credit (e.g., the

seller) should also strictly observe the terms and conditions, under which credit is made available to him by the person opening the credit; that

would arise under the very contract which had been entered into. One of the duties of a seller under a c. i. f. contract (the instance case is a c. i. f.

contract) is to procure a contract of affreightment under which the goods will be delivered at the destination as specified in the contract

Where the terms of credit authorises payment on presentation of a clean bill, it will obviously be his duty to present a clean bill. If circumstances are

such that in respect of the Goods consigned by him he would be entitled only to an unclean bill of Lading, he should not draw monies thereon; if, in

those circumstances, he procures a clean bill of lading (knowing that he was not entitled to it) and obtains money under the credit note he will

undoubtedly be guilty of deceit. A shipowner, who with knowledge of the intention of the shipper gives a clean bill where the Condition of the

consignment was such that no such clean bill could be given, would be equally guilty of deceit.

21. A bill of lading is a writing signed by the owner of the ship, in which the goods are embarked, acknowledging the receipt thereof the conditions

of carriage and an undertaking to deliver at the end of the voyage; it is a document of title, and a mere assignment thereof would pass the title of the

assignor to the goods, and also amount to a constructive delivery of the same. Having regard to the nature of the document and its importance in

international commerce, the shipowner would have an obvious duty to describe correctly therein the condition of the goods received by him,

The goods being on sea, the concerned persons, i.e., bankers, traders etc., who negotiate the bill, will have to depend only on the statements

contained therein. This does not, however, mean that a shipowner guarantees the contents of the packages. But he should note in the bill all

external defects, or defects noticeable on inspection of the goods, or their packing which existed when they were delivered to him.

The printed form of a bill of lading generally contains a clause that goods were received on board the ship in apparent good order and condition.

Good order implies that packing was sound; good condition relates to the apparent condition of goods themselves. Where a consignment is

defective, it would obviously be the duty of the shipowner to qualify those words, otherwise the concerned public would be misled by the general

statement. In 1957 2 QB 621, *Morris, L. J.* observed at page 631 :

A shipowner clearly intends that the bill of lading he issues should be relied upon. He intends that it should be relied upon by those into whose

hands it properly comes; consignees, bankers, and indorsees must be within his contemplation. A bill of lading is issued with the purpose that it

should be relied upon. This could not have been more clearly illustrated than it was in the testimony of the plaintiffs' witness. He knew, for

example, that banks are very often only prepared to advance money if clean bills of lading are forthcoming. If a shipper knows that he will only be

paid if he can present a clean bill of lading and knows that the goods he is shipping are so defective that they could not be given a clean bill, and if,

in order to get his money, he persuades a shipowner to issue a clean bill, and if the shipowner both knows that a clean bill ought not to be issued

and that the bill will be relied upon by others, it seems to me impossible to contend that the shipowner does not make a representation with the

intention that it should be acted upon".

The statements contained in a bill of lading being thus representations, the shipowner would be held liable, if they amount to actionable or

fraudulent misrepresentation to all those persons to whom such statements could be held to have been made, who suffer damages by acting on the

faith thereof. In *Silver v. Ocean Steamship Co. Ltd.*, 1930 1 KB 416, it was held that the words "received in apparent good order and condition

in a bill of lading, were not terms of a contract between the shipper and the

shipowner, but a representation of a fact.

One consequence of such a representation will be that the shipowner will be estopped from contending that the goods were not received in

apparent good order and condition as against any person who, acting on that representation, suffered a loss. This liability is relied on by the

appellant to contend that so long as the goods were delivered without any loss in transit, no occasion for enforcing this liability against the

shipowner will, at all, arise, and, it would be immaterial whether the goods had been correctly described in the bill of lading or not, and, therefore,

even if the omission of the words re-used is considered as a material omission, the consignee would have no cause of action against the shipowner.

The principle, on which the liability of the shipowner is based in case of loss of goods, is different from the one on which the present claim is based.

Let us examine the basis of the former liability. A shipowner would ordinarily be liable to pay the consignee such damage as occurred during the

voyage. Where, however, he delivers the goods in the same condition in which he himself got them, there would be no liability; even if loss had

occurred for them, such damage would have been due to reasons other than the fault of the carrier, e.g., a case of defective packing.

Where therefore goods are loaded defectively packed, but the shipowner does not note it in the bill of lading, it would be a representation that the

goods have been received in good condition. Persons who act on the faith of that representation by becoming indorsees of the bill of lading, etc.,

who suffer a loss, can hold the shipowner liable for it, notwithstanding that the loss was due to a defective packing, and the latter would be

estopped from pleading that the loss was not due to any fault of his.

This liability is on the basis of the contract of carriage, whereas the liability now sought to be enforced, is in tort. It is one for damages for

actionable misrepresentation. It cannot be disputed that when the appellant issued a clean bill of lading, not noting the defects in the description of

packing as contained in the mate's receipt, it did represent that the goods were received in apparent good order and condition, while they were

actually not so.

The description in the mate's receipt would indicate that the shipowner knew that the statements in the bill of lading were not correct. It cannot be

said in those circumstances that the shipowner actually and honestly believed the statements therein as truly representing the condition of packing, particularly in the context of the existing commercial practice and the indemnity he took covering himself against claims for the deletion of the word "re-used".

22. It was contended for the appellant that he was not aware of the terms of the letter of credit, and that there was no evidence of his being a party to the seller's fraud. We cannot accept the first portion of the contention. We have already referred to the existence of an usage in international trade under which a seller, who could obtain only an unclean bill of lading which would not enable him to draw on a letter of credit, obtains from the shipowner a clean bill agreeing to indemnify him. The appellant must have been aware that a clean bill was required to induce the bank to pay the money; it was his duty, therefore, to disclose every circumstance existing to his knowledge which would impair the negotiability.

23. We are of opinion that the latter part of the contention is not relevant for the present case. The liability of the appellant is not for the non-delivery of the goods contracted for, but for a failure to do its duty by giving a correct bill of lading, or for a fraudulent misrepresentation therein.

There can be no doubt in the present case that misrepresentation was the direct cause of the loss. If the shipowner had given an unclean bill of lading (which alone he was bound to give in the known circumstances of the case), the banker would not have paid, and even if he did, the buyer would not be bound by it, having regard to the terms of the letters of credit.

24. In view of the fact that a bill of lading is a document of title to goods which would pass by negotiation, the representations or misrepresentations herein, should be held to have been made to every individual who comes by it as a holder thereof. There is thus a breach of duty on the part of the shipowner in not disclosing the correct facts which would affect the negotiability of the bill of lading and an actionable false representation as to the condition of the packing of the goods received by him. The first respondent who suffered loss by reason of that misrepresentation would be entitled to the decree granted to him, by the lower court. The appeals fail and are dismissed with costs (Advocate's fee one set).