(1974) 09 MAD CK 0029

In the Madras High Court

Case No : Appeal No. 688 of 1969

The Great Eastern Shipping Co. Ltd. APPELLANT

Vs

The Union Carbide India Ltd. RESPONDENT

Date of Decision : 20-09-1974

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Section 2

Citation : (1975) ILR (Mad) 456

Hon'ble Judges : Ramaprasada Rao, J;Maharajan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Maharajan, J.—This appeal is directed by the Defendant against the judgment of the learned Second Assistant Judge, City Civil Court, Madras, whereby the suit of the Plaintiff-Respondent was decreed as prayed for with costs. The Plaintiff, Union Carbide India Ltd., is a limited liability company, carrying on business at Tiruvothiyur High Road, whereas the Defendant is the Great Eastern Shipping Co. Ltd., carrying on business at Madras, through its agents P. Devarajooloo & Sons. On 20th August, 1,965, a consignment of 1516 bags of Zinc calots was entrusted to the Defendant for carriage by sea by its vessel S. S. Jag Ganga from Calcutta to Madras. The vessel arrived at Madras on 2nd September 1965, and discharged the cargo. Suspecting heavy shortage in 126 bags out of the total consignment of 1,516 bags, the Plaintiff applied on 3rd September, 1965 to the Defendant''s agent Devarajooloo Naidu & Sons for survey, and on survey by the Defendant, it was found that there was a shortage of 3,017 Kgs. of calot zinc. According to the Plaintiff, the value of the shortage came to Rs. 9,714-74. The original bill of lading and survey report were forwarded to the Defendant for settlement of the claim. But the Defendant failed and neglected to pay the amount, with the result the Plaintiff instituted the suit for recovery of the sum of Rs. 9,714-74.

2. The Defendant, in its written statement, while admitting that the consignment of 1,516 bags of zinc calots was entrusted to it for carriage by sea from Calcutta

to Madras, as per the bill of lading dated 20th August, 1965, contended that the bags were not sufficiently strong to withstand ordinary handling in transit, that the nature of the cargo was such that the bags would get torn and tattered even during normal handling, that under the contract of affreightment, the ship was not responsible or liable for slack, cut and torn bags and loss or shortage of contents, and, therefore, the carrier was exonerated of all liability for the damage sustained by the shipper. The Defendant also put the Plaintiff to strict proof of the weight and value of the shortage. It further contended that the vessel carried the cargo during rainy season and it encountered bad weather during the passage from Calcutta to Madras, and the carrier cannot be held liable for any damage caused by such rainy weather. The Defendant also took the plea that if the loss had been occasioned while the cargo was in the custody of the Port Trust, it is the Port Trust that would be liable, and not the Defendant, and that the suit was bad for non-joinder of the Madras Port Trust.

3. The learned Judge framed the following issues for trial:

1. Was the cargo insufficiently packed ?

2. In the Defendant not liable for the shortage because of the alleged insufficiency of packing ?

3. Is the suit bad for non-joinder of Madras Port Trust ?

4. What is the quantity of material delivered short ?

5. What is the value of short delivered goods ?

6. Does not the clause in the Bill of Lading relieve the carrier from all liability ?

7. To what reliefs are the parties entitled ?

The trial Court recorded finding on every one of these issues against the Appellant. These findings, other than the one relating to non-joinder of the Madras Port Trust, are attacked in this appeal.

4. The first question that arises for consideration is whether there is any clause in the bill of lading, which relieves the carrier from liability to pay damages for short delivery ? Exhibit B-1, is the bill of lading admittedly issued by the Defendant in respect of the suit consignment on 20th August, 1965. It shows that 1,516 bags of calot zinc were loaded in S. S. Jag Ganga at Calcutta, the port of embarkation, that the consignment was said to weigh 79,519 Kgs., and a freight of Rs. 6,404.37 was charged therefore on the basis that the bags weighed, 79,519 Kgs. gross. On the first page of the bill of lading, there is a type-written endorsement, which reads as follows:

S/N/R/ (Ship Not Responsible) For Slack, Cut Torn Bags, Nil Marks Loss or Short of Contents.

Lower down in the bill of lading, the following clauses, partly in print and party typewritten, appears.

Shipped, in apparent good order and condition by Union Carbide India Limited, on Board the Ship Jag Ganga. 271...lying in or at the port of Calcutta to be delivered at Madras... The said goods to be carried and delivered subject to the terms and conditions of this Bill of lading in the like good order and condition at the port of Madras unto Order or his or their assigns.

There is also on the front page of the bill of lading a rubber stamp endorsement, which runs as follows

Bags insufficiently strong to withstand ordinary Handling in Transit. Steamer not responsible for Bursting and Tearing of Bags and Consequent loss of and/or damage to contents.

Though the bill of lading says that 1,516 bags of calot zinc were shipped at Calcutta, exhibit A-3, the Survey Report issued by the Shipping Company''s agent at the port of discharge, shows that out of the 1516 bags, all except 126 bags were in tact, and that 126 bags were torn, and the weight of these 126 bags was only 3,440 Kgs. Subsequently at the instance of the insurer of the Plaintiff, P.W. 2, who is the Director of a shipping firm called Sugesan & Co., Private Limited, and who is the President of the Madras Shipping & Clearing Agents Association inspected, weighed and surveyed the bags. He found that all the bags were in good condition, except the 126 bags, that the zinc calots remaining in those 126 bags were oxidised and soiled, that the net weight of the whole consignment of 1,516 bags being 79,947 Kgs. and the pro-rata weight of 126 bags being 6,457 Kgs., there was a shortage of 3,017 Kgs., in those 126 bags. The evidence of P. Ws. 1 and 2 shows that the bags Were of uniform capacity, and that the shortage of the contents was due to the tearing of the second-hand gunny bags as a result of rough handling in transit. It is also found from their testimony that each zinc calot resembles a rupee coin, and is of the size of a rupee, though it is double the thickness of a rupee, and these calots are used for punching out battery casings. It is fairly clear from the uncontradicted testimony of P. Ws. 1 and 2 that the prorata weight of 126 bags should be 6,457 Kgs. but the actual weight was only 3,440 Kgs. thereby showing a shortage of 3,017 Kgs. The Plaintiff has not claimed any damages for oxidation of 3,440 Kgs, which still remained in the torn bags, though, according to the Survey Report exhibit A-4, oxidation thereof had rendered them unfit for producing battery casings. The Plaintiff confines its claim for damages only for the complete loss of 3,017 Kgs. of zinc calots. The Defendant, on the other hand, claims immunity on the ground that the bill of lading given to the Plaintiff was not a clean one, because it contains an endorsement to the effect that the bags are insufficiently strong to withstand ordinary handling. It is said that it is this defect in packing that is responsible for the disappearance of the zinc calots.

5. Before discussing the rival contentions of the parties, it is necessary to refer to the relevant provisions of the Indian Carriage of Goods by Sea Act (XXVI of 1925), which was enacted to give the force of law to the recommendations made at the International Conference on Maritime Law held at Brussels in October,

1922. Subject to certain exceptions, the effect of this Act is to introduce into the bills of lading certain clauses defining the minimum risks to be assumed by sea carriers for the period of voyage as well as to formulate certain rights and immunities, which the sea carriers may enjoy. As set out in the rules scheduled to the Act they become by law part of the terms of the contract for the carriage of goods by sea. Actually, the provisions of the Act modify the terms of a conventional contract by legislative bargain and control to some extent the freedom of contract, which the parties would otherwise enjoy. For instance Section 2 of the Act states:

Subject to the provisions of thus Act, the rules set out in the schedule hereinafter referred to as 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 India to any other port whether in or outside India.

Rule 1 of Article III of the schedule to the Act directs:

The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to....

(a) Make the ship sea worthy:

(b) Properly man, equip, and supply the ship ; and

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation.

This is an important statutory duty imposed upon the carrier and the carrier cannot contract himself out of this duty. He cannot, therefore, say that because of some defect in the part of the ship in which the goods were carried, damage to or loss of the goods has occurred. Then, there is Rule 2 of Article III of the schedule, which provides:

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Since the rule begins with the words subject to the provisions of Article IV, it is clear that the liability under the rule is subject to those provisions.

6. Next, we may refer to Rule 8 of Article III, which reads as follows:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with the goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.

This rule makes it manifest that any stipulation in the contract between a shipper and a sea carrier would be totally void if it is repugnant to the statutory rules.

7. We may next turn to Article IV in the schedule to the Act, which deals with rights and immunities. Rules 2 of Article IV prescribes:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from....

(n) insufficiency of packing.

The other clauses in Rule 2 of Article IV are omitted, because learned Counsel for the carrier places great reliance only on Clause (n) of Rule 2 in support of his contention that the short delivery in this case is due to insufficiency of packing and consequently neither the carrier nor the ship shall be responsible therefor. In order to examine the soundness of this contention, it is necessary to revert to the express terms embodied in the bill of lading. As we have already noticed exhibit B-1, recites that 1,516 bags of calot zinc have been:

Shipped in apparent good order and condition by Union Carbide India Limited on Board the ship Jag Ganga Voy. 271 lying in or at the port of Calcutta to be delivered at Madras.

and the said goods were undertaken by the carrier to be carried and delivered subject to the terms and conditions of this bill of lading in the like good order and condition at the Port of Madras. It is indeed difficult to conceive that a ship-owner, who receives 6,516 bags of calot zinc, out of which 126 bags were torn, would ever describe the consignment as in apparent good order and condition, and can, after issuing such a clean bill of lading, attempt to prove the opposite when shortage is discovered at the port of discharge. If the insufficiency of the packing was visible and apparent at the time of the loading, the carrier would most certainly not have described the same as in apparent good order and condition.

8. In Silver v. Ocean Steamship Co. Ltd. (1920) 1 KB 416 it was held as follows

The incorporation of the provisions of the Carriage of Goods by Sea Act, 1924, in a bill of lading stating that the goods have been "shipped in apparent good order and condition" does not affect the obligation of the ship-owner to deliver the goods in the like good order and condition unless he can prove facts bringing him within an exception excluding his liability, or can show that damage has been occasioned through some cause which was not apparent on a reasonable examination of the goods when shipped. It was further held in that case:

A ship-owner, who signs a bill of lading for goods "shipped in apparent good order and condition" is estopped as against the holder of the bill of lading from alleging that the goods in respect of matters externally visible on a reasonable examination, were not in good condition when shipped ; and is further estopped from alleging that by reason of the particular nature and shape of the containers in which the goods are placed damage to the goods has been caused by ''insufficiency of packing'' within Article IV Rule 2, of the Schedule to the Carriage of goods by Sea Act, 1924, where the nature and shape of the containers were apparent on the shipment of the goods.

It was also held in that case that the fact that the holder of a bill of lading containing the statement that the goods were shipped in apparent good order and condition takes it without objections as a clean bill of lading is sufficient evidence that he relied upon it, and that reliance by the shipper on the bill of lading formed an adequate basis for the plea of estoppels against the carrier. In this case, the shipper accepted the bill of lading and paid the fare prescribed therein. There can, therefore, be no doubt that he acted to his detriment upon a statement of fact made by the carrier in the bill of lading.

9. Learned Counsel for the Appellant who failed to bring to our attention the apparent good order clause in the bill of lading, focused his attention mainly on the rubber stamp endorsement, which says that the bags are insufficiently strong to withstand ordinary handling in transit. The language of this endorsement is ingeniously evasive and suspiciously circumlocutious. Does the expression mean that the bags were strong enough to withstand ordinary handling, but not sufficiently strong ? What are the degrees of sufficiency contemplated by the carrier, and how are we to draw the line between sufficiently strong bags and insufficiently strong ones? The introduction of such perplexing nuances is bound to throw the shipper off his guard and to stealthily expand the area of immunity, which is vouchsafed to the carrier under the statute, besides being in direct conflict with the printed clause in the bill of lading which says that the bags were in apparent good order and condition. If the goods were in apparent good order and condition the carrier dare not untruthfully say that they suffered from insufficiency of packing. Insufficiency of packing alone could, under the statute, give immunity to the carrier. Had that expression been invoked in the bill of lading, the shipper would most certainly have protested against it. It is to obviate the protest of the shipper that the clause relating to apparent and good order and condition appears to have been retained and without in any manner scoring out that clause, a mechanical rubber stamp endorsement was affixed, the ambiguity of which shows that the carrier was eager to get out of his irreducible statutory liability, but was afraid to say so openly. In these circumstances, it is not surprising that the learned trial Judge, while refusing to ascribe any weight to the rubber stamp endorsement on the ground that it was probably a routine affair, went the length of holding that the endorsement was void under Rule 8 of Article 3. It is unnecessary for us in this case to go so far. But we do think that the rubber stamp formula evolved by the carrier in this case is an ineffective attempt to destroy the unambiguous admission made in the bill of lading that the bags were apparently in good condition and order. P.W. 2, who is an expert, says that the bursting of the bags leading to shortage was due to rough handling in transit, and adds

Normally, I would not say that the packing was insufficient because the weight of each bag was only about 50 Kg. That is the usual packing so far as this shipment is concerned.

No evidence has been adduced by the Appellant to contradict the opinion of P.W.2. There is also the evidence of P.W. 1, who has been the stores assistant in the Plaintiff''s company for the past over a decade, to the effect that ever since the Plaintiff''s company was started, they have been receiving zinc calots only in gunny bags daily and that in his experience, the bags are strong enough to hold the calots. His evidence also remains uncontradicted, We accept the evidence of P. Ws 1 and 2, and taking it in conjunction with the admissions made by the carrier in the bill of lading, we hold that the consignment did not suffer from insufficiency of packing at the time of loading, and because the carrier failed to discharge his statutory duty under Rule 2 of Article III of properly and carefully loading, handling, stowing, carrying, keeping care for and discharging the goods carried, the shortage of the goods has been caused. It is remarkable that out of 1516 bags, all but 126 bags remained untorn and in tact. Even assuming that these 126 bags alone developed leakages, owing to their being insufficiently strong, the carrier has utterly failed to establish any nexus between the leakages in the bags and the disappearance of the zinc calots. The zinc calots are heavy metallic substances, which are not volatile, and they could not vanish into thin air the moment they leaked out of the bags into that part of the ship where the cargo was stowed. By such leakage, the zinc calots might have become exposed to moist air and thereby got oxidised and soiled. But the Plaintiff does not claim any damages on account of damage due to oxidation.

The Plaintiff claims only compensation for the loss of the zinc calots. The calots could not disappear unless they were pilfered, and the pilferage is certainly not the result of the bags being insufficiently strong to withstand ordinary handling. It is the plain duty of the carrier to protect the leaked-out calots from pilferage, and under Rule 2 of Article III , to properly and carefully keep care for the goods carried. In Carvers carriage by Sea volume I (twelfth edition), at page 19, the following passage occurs:

Negligence. A ship owner will not be exonerated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them ; or to guard against their possible effects ; or to arrest their consequences.

We accept the view of the learned author and hold that it was the duty of the carrier, when he observed the spilt and scattered zinc calots, to collect them together, guard them against pilferage and transport the same carefully to the destination. We consider that the disappearance of the zinc calots is due to the failure of the Appellant-Defendant to carefully and properly preserve and look after the spilt and scattered calots, and that the carrier is, in any event, liable to pay the Plaintiff-Respondent the value thereof. This point is answered accordingly.

10. The next question that arises for determination is, what is the quantity of the material short delivered ? We have already accepted the evidence of P.W. 2 as to the quantity of shortage. Taking the net weight of the entire consignment and having regard to the fact that the bags were of uniform size, he worked out the

pro rata rates and found that the 126 bags should weigh 6,457 Kgs., but as the actual weight of these 126 bags was found to be only 3,440 Kgs., he rightly concluded that the weight of the missing calots should be 3,017 Kgs. The Plaintiff has claimed Rs. 9,714.74, as the value of 3,017 Kgs. of calots. The Plaintiff claimed this amount under the original of exhibit A-6, dated 12th August 1966, after enclosing therewith exhibit A-5, the bill. The Defendant sent no reply questioning the correctness of the claim ; nor has any argument been advanced attacking the basis of the Plaintiff''s valuation. We, therefore, accept the Plaintiff''s case in this behalf and answer this question against the Appellant.

11. In the result, the appeal fails and will stand dismissed with costs.

