

(1985) 07 KL CK 0024
In the High Court Of Kerala
Case No : A.S. No. 9 of 1979

The New India Assurance Co. Ltd. and Another	APPELLANT
Vs	
Splosna Plovba and Others	RESPONDENT

Date of Decision : 23-07-1985

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Article 3, 4
Carriage of Goods by Sea Rules — Rule 2

Citation : AIR 1986 Ker 176

Hon'ble Judges : P.C. Balakrishna Menon, J;K. Sukumaran, J

Bench : Division Bench

Advocate : V.K. Parekh, T.L. Anantha Sivan, P.K. Jose, Annie John and Santhamma A.T, for the Appellant; P.K. Kurian, K.A. Nair, E.R. Venkiteswaran, J.B. Koshy and P. Ramakrishnan Nair, for the Respondent

Final Decision : Dismissed

Judgement

Sukumaran, J.—Calicut enjoyed a reputation for its timber trade. Not without reason. It had a port, with limited facilities but unlimited historic connections. In its periphery flourished one of the best timber markets of the world, fed by what was once a boundless contiguity of tropical forests. The appeal at the instance of the plaintiffs -- the insurer and the shipper -- arises from an export transaction originating from that port. The carriers were from Yugoslavia and the consignees from Japan. Defendant 2 acted as agents in India for defendant 1 Carriers. Defendants 3 and 4 owned, operated and managed the boat engaged for transport of the timber logs from the shore to the ship.

2. The ship "M.V. Litija" anchored off Calicut at a distance of about three miles from the shore at about 15th April, 1972. The 2nd plaintiff who had entered into a contract for the export of timber, had obtained from the Customs Department on 7-4-1972 the shipping bill authorising the export of 23 logs of timber. They were loaded on to the boat in the evening of the 15th April, 1972; and the boat was towed by, the Tug to the ship and tied along side the ship at about 8.30 A.M.

on 16-4-1972. Two logs among the lot were loaded on to the ship. Before the third one could be loaded, the boat sank into the sea. The view of the sinking boat towards its last phases was secured by the photographs taken by a passenger on board the ship who was enjoying a trip around the world (Exts. B8 and B13 are the photographs and their negatives).

The ship sounded the siren and gave a signal to the Port Office. The Tug Zamorin rushed to the spot and saved the crew by about 10.30 A.M. The sinking of the boat was noted in the Log Book Ext. B14, Ext. B14(a) being the English translation from the Yugoslavian language. The Port later gave clearance to the ship for sailing; and accordingly "Litija" left the Port at about 1.30 P.M. on 16-4-1972. Salvage operation partly succeeded; some logs were recovered; and some lost.

3. The goods were fully insured. The 1st plaintiff settled the claim of the shippers. They have now filed the suit, along with the shippers, claiming damages against defendants 1 to 4. Liability is sought to be cast on defendants 1 and 2 on the basis that they were responsible for the entire operations connected with the shipping of the timber, commencing from the loading of the logs on to the boat at the pier and the ultimate delivery of it to the consignees. According to counsel, this head of the claim came under what he termed as a contractual liability.

Negligence was also alleged against defendants 1 and 2 on the ground that the winch of the ship failed when a log was being lifted. The log that slipped fell on the boat and caused it to be capsized. Counsel for the appellant described it as a tortious liability on the part of the carriers.

4. The defendants disputed the liability. We are concerned in this appeal only with defendants 1 and 2. According to them, they had no responsibility in respect of the goods prior to their delivery on board. They disclaimed any liability in relation to the equipment and operation of the winch.

5. By a detailed judgment (which has done justice to the elaborate evidence, oral and documentary, and the extensive arguments covering 12 days), the Court below dismissed the suit as against defendants 1 and 2 and decreed it as against defendants 3 and 4. The appeal is directed against the judgment in so far as it has exonerated defendants 1 and 2 from the liability for the plaintiff claim.

6. Though large number of contentions had been urged before and considered by the Court below, it is unnecessary to refer to all those details in view of the pointed nature of the arguments addressed before, this Court.

7. On the contractual liability, the plaintiff relied on Ext. A Shipping Bill, Ext. A4 contract by others and Ext. A3 Bill of Lading, in particular Clause 3 thereof. These documents do not in any way help to establish the liability on the part of defendants 1 and 2 in relation to the loading operations of the timber from the pier to the ship. The shipping bill only evidences the fact that the Customs had,

from their point of view, given clearance for the export of the cargo. There is nothing in Ext. A4 which in any way throws any light on the obligation to arrange for the transport of the logs from the shore to the ship. The description of the goods, quality, price, shipment, destination, freight, shipping marks, insurance are the, terms which are dealt with therein. As against the column "shipment", the only entry is "as early as possible from Cochin or Calicut." The other particulars do not in any way relate to the transport of the goods up to the ship.

The bill of lading only evidences the contract of the goods covered thereby. Ext. A3, as noted by the Court below, does not relate to the 21 logs which had sunk with the boat. Consequently, "no liability can be placed on defendant No. 1 on the basis of the terms of Ext. A3," as observed by the trial Court.

8. The plaintiff's case is in a sense totally demolished by the letter Ext. A23 dt. 22-5-1972 sent by the 2nd plaintiff to the 1st plaintiff. The letter states:

"Our Boat and loading Contractor Sri. P. P. Hamza engages Boats according to our requirements. There is no contract of carriage either between us and the Boat Contractor or between us and the Boat owner. The shipping Company has nothing to do with the transport of our rosewood logs from the pier to the ship M.V. Litija. If the logs are sent along side the ship within the time stipulated by them the logs would be taken on board the ship. Otherwise the goods may be shut out."

In view of the above evidence, defendant 1 does not have any responsibility for the transport of the goods in the boat. It will necessarily follow that defendant 2, who is only an agent of defendant 1, does not have any such liability, there being no case as against defendant 2 of any liability arising otherwise than as the agent of defendant 1.

9. We shall now consider the alternative contention of the liability grounded on tort? The 3rd log from the lot of plaintiff 2 was in the process of being loaded on to the ship. The log had however, fallen down on the ridge of the boat from a height. This impact caused the boat to list to the West, when water burst in and the boat sank. Whether it would be the fault of the equipment or the default of the workman on board the ship, defendants 1 and 2 would be liable for such negligence -- was the argument. Though the plaintiffs have examined large number of witnesses, those who could give direct evidence about the reason for the capsizing of the boat were only two of them, P. Ws.3 and 5. Others do not have direct or personal knowledge about the circumstances under which the boat went down the waters.

10. We have been taken to the evidence of P. Ws. 3 and 5. P. W.3 claimed to have worked as foreman on board the ship on 16-4-1972. He had claimed to be a workman on the shore but had gone to the ship only on that day. In cross-examination he stated that he was working under the stevedore and as a foreman of the workmen engaged by the stevedore. Though there were three stevedores in the Calicut Port, he had not been registered with any one of them.

He had no permanent workers under him. There was no document whatever to show that he was working as a foreman on board the ship.

These and other answers elicited in the course of the cross-examination, would clearly show that he was just picked up from some where to speak to matters not in his knowledge. On the crucial question about the cause for the boat to capsize, he says that his information was only hearsay. He does not know whether there was a hole in the bottom of the boat. The Court below was only charitable to him when it adversely commented upon his testimony"s emanating from a man of confusion and one without any correct information. That Court also stated while evaluating his evidence:

"The above inconsistent answers given by P. W. 3 would according to me indicate that he has been got at conveniently by the plaintiffs just to say that he was present on board the ship on 16-4-1972 when the boat sank and he witnessed the whole incident." .

We are of the view that his testimony was rightly discarded by the Court below.

11. Equally unsatisfactory is the evidence of P. W. 5. He was stated to be a tidal of the boat. Concededly he was an illiterate person and unable to read or write. The statements Exts. XI and X2 are respectively the English translations of the application dt. 19-4-1972 from P. W. 5 to the Port Office seeking permission to note a protest in relation to the incident relating to the sinking of the boat. Ext. X2 is the English translation of the protest actually made by him on 17-5-1972. The Court below was correct in observing that the originals had not been duly proved.

The disparity between the versions given in Ext. XI on the one hand and Ext. X2 on the other and the divergence from both as disclosed in the plaint have been commented upon by the Court below. The log book which P. W. 5 admitted to have been in the boat had not been produced in the case. Even P. W. 5 admitted about the operations relating to pumping of water from the boat prior to the alleged fall of the log. He also admitted about the possibility of the boat developing a leak in the course of its transit from the pier to the ship. Having regard to the various circumstances, and reading the deposition given. by him. we agree with the Court below that it will be unsafe to place any reliance on the evidence of P. W. 5.

12. It is for the plaintiffs to prove by acceptable evidence the negligence they have attributed to the ship in the operation of the winch used in the loading operation. There is no satisfactory evidence on that aspect, as noted above. In that situation, the plaintiffs" case of tortuous liability as against defendant 1 has to be rejected as not substantiated.

13. The finding of the Court below as to the exact cause for the boat to capsize may also be referred to in this connection. The plaint in para 3 stated:

".....while the third log was being lifted on board the said vessel by the

employees engaged by the steamer company, the part of the winch to which the wire rope tied around the log was hooked gave way and the log fell on the boat, rebounded and fell into the sea between the boat and the ship."

This was the case indicated in the earlier correspondence emanating from the plaintiffs. Exts. A5, A6. All, A12 and A13 as also Exts. XI and X2 would evidence that. A different story was, however, sought to be developed while adducing evidence. That was to the effect that the log which fell from the winch hit the bottom of the boat and made a hole about three feet in diameter, through which the sea water could gush in with all force and fury, and fill the boat with water in no time.

The Court below rightly rejected the story which on the face of it was extremely artificial. The logs had been stacked length-wise in the boat. Twenty one logs were still in the boat when it sank. If at all the log on its fall would only hit against the other logs stacked on top in the boat. It is impossible to conceive that the log would have steered clear through all the other 21 logs, and then pierced the bottom of the boat, as if propelled by an effective remote control device.

14. The seaworthiness of the boat attempted to be established would not affect the finding directly or substantially. The certificate of seaworthiness had not been produced. There was no material to indicate the person who inspected and issued the certificate and the date on which the certificate was issued. The possibility of the boat developing defects in the structure undermining the seaworthiness after the issue of the certificate cannot be ruled out. As noted earlier, there was evidence in the case that the boat was leaky, necessitating the bailing of water even when it was engaged in the transport of the timber in question.. A positive finding about the actual cause for the capsizing of the boat coupled with a paucity of evidence about the defects in or improper operation of the winch in the ship, would fully justify the finding of the Court below exonerating defendants 1 and 2 from any liability whatever.

15. The Court below had devoted considerable discussion on the general law relating to the obligation of the carriers. It had also discussed the scope and ambit of Ext. A3 bill of lading on the assumption that such a clause will be applicable in relation to the goods that had been taken in the boat alongside the ship. In view of our conclusions on die factual aspects discussed above, these questions do not arise at all.

16. It was contended before us also that the responsibility of the carriers would commence even before the actual delivery of the goods on board the ship, and consequently, even before the issue of a bill of lading:

17. The Court below, while discussing this aspect, expressed its view in the following words:

"Even accepting the evidence of P. Ws. 3 and 5as true and that the evidence of

D. W.1 is not true in the absence of a clause in Ext. A3 that the ship's responsibility commences once the log is hooked to the hook of the tackle of the ship -- I find on a fair reading of Clause 3 and 7 of Ext. A3 (this is assuming that there is a contract for carrying the remaining 21 logs in boat No. 250) that the ship's responsibility does not commence before the goods cross the ship's rails. The passages in the 3 Text books cited supra in paras 11 and 12 would indicate that the responsibility can arise only after the cargo is put into the custody of the master of the ship or one of its authorised officers. There is no such case or evidence to uphold such a case of the plaintiffs."

18. The general position in law, and the effect and impact of the Carriage of Goods by Sea Act, 1924 could be usefully gathered from the judgment of Lord Devlin, J. in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* (1954) 2 QB 402. That was, no doubt, a case where the ship owner ".....in fact undertook the whole operation of loading....." A contention that the rules contained in the Carriage of Goods by Sea Act, 1924 can get incorporated in the contract of carriage only if a bill of lading is issued was rejected by the Court in that case. Devlin, J. observed:

"In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply."

The learned Judge at the same time observed:

"But" I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."

19. It is only further necessary to refer to a later decision of the Privy Council in *G. H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama* 1957 AC 149 where the dictum of Devlin, J. was approvingly referred to. (See the speech of Lord Morton of Henryton at page 170).

20. Scrutton on "Charter Parties and Bills of Lading". 19th Edn. comments on these two decisions while discussing Art. II of the Schedule to the Carriage of Goods by Sea Act, 1924:

"Loading..... and discharge. This is the crucial Article applying the rights and liabilities in the subsequent Articles to the operations it enumerates. Article 11, Rule 2 provides that, subject to the rights and immunities of Art. IV, the carrier shall properly and carefully, inter alia, load and discharge the goods. Before the decision of the House of Lords in *Renton v. Palmyra Trading Corporation of Panama* it was doubtful how these two provisions were to be interpreted in their

application to the operations of loading and discharging.

There were three possible views: (i) the carrier, whether he wants to or not, is obliged to perform or undertake responsibility for the whole of loading and discharging; (ii) the carrier is only responsible under the Rules for that part of loading and discharging which takes place on the ship's side of the ship's rail; (iii) the carrier is only responsible for that part, if any, of either operation which it is agreed shall be carried out by or under arrangements made by him.

In *Pyrene Co. v. Scindia Navigation Co.* 1954 2 QB 402, Devlin J. rejected the second view and preferred the third, and his choice was approved in *Renton v. Palmyra Trading Corporation of Panama* by Lord Morton of Henry ton (with whom Lord Cohen agreed), and by Lord Somerve of Harrow. It may therefore be taken as clear that the object of the Rules is to define not the scope of the contract service but the terms on which that service is to be performed."

21. In the light of the principles discussed above, it may become necessary to consider whether the carrier has limited his liability in the manner aforesaid. The limitation of liability is based on the Bill of Lading itself. The Court below has referred to Clause 3 and 7 in the bill of lading (Ext. A3) and considered their effect. The relevant portions of those clauses read:

"3. Responsibility. The carrier shall not be liable for loss or damage to the goods during the period before loading into and after discharge from the vessel howsoever such loss or damage arises. Loading commences when the tackle is hooked on the cargo and discharge ends when cargo is taken off ship's tackle. Goods in custody of the carrier or his servants before loading and after discharge whether being forwarded to or from the ship or whether awaiting shipment, landed or stored or put into hulk or craft belonging to the carrier or not, or pending transshipment at any stage of the whole transport, are in such custody at sole risk of the merchant and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever."

7. Loading, Discharge and Delivery of the cargo shall be arranged by the Carrier's agent unless otherwise agreed.

Loading, storing and delivery shall be for the merchant's account.

Loading and discharging may commence without previous notice."

22. These provisions in the bill of lading have to be understood in the background of the general concept of "loading" in maritime law-- Earl of Selborne L.C. in *Grant & Co, v. Coverdale Todd & Co.* (1883) 9 AC 470 posed the question: "What is the meaning of loading?" and answered it in the following words:

"There are two things to be done-- the operation of loading is die particular operation in which both parties have to concur..... No doubt, for the purpose of loading, the charterer must also do his part; he must have the cargo there to

be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions sine quibus non of that operation -- everything before that is the charterer's part only."

23. As with loading, so with discharge, the corresponding obligation at the culmination of the voyage. The discharge of the delivery from the ship takes place at that juncture. This too is a joint operation. The jointness of the operations is discussed by Lord Esher M. R. in *Petersen v. Freebody & Co.* (1895) 2 QB 294:

"Whichever word be used, whether it be called a "discharging" or "delivery", and whatever be the circumstances of the delivery, one party is to give, and the other is to take, delivery at one and the same time, and by one and the same operation. It follows that both must be present to take their parts in that operation. Those parts are, the ship has to deliver and the consignee to take delivery -- where? Each has to act within his own department. The shipowner acts from the deck or some part of his own ship, but always on board his ship. The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery is to be on to another ship, he must be on that ship; if into a barge or lighter, on that barge or lighter; if on to the quay, on the quay. Wherever the delivery is to be, the shipowner, on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery: that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more -- he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them; but the moment the goods are put within the reach of the consignee he must take his part in the operation. At one moment of time the shipowner and the consignee are both acting -- the one in giving and the other in taking delivery; at another moment the joint act is finished. Where goods are slung, and lowered gradually over the side of the ship into a lighter, they cannot all be deposited on the same spot in the same lighter. It is obvious, therefore, that those on board must help in the operation of taking delivery by guiding the thing as it is coming down into the lighter."

(The observations have to be carefully read, taking note of the fact that they are made in the context of discharge of the goods from the ship.)

24. In relation to a timber carriage, the concept of taking delivery was explained by Lord Esher M. R. in *Aktieselskab Helios v. Ekman & Co.* (1897) 2 QB 83. It was

observed therein:

"It is part of the operation of taking delivery of the cargo that the consignee or merchant should provide barges and bring them alongside in such a position that the timber can be delivered from the ship into the barge. The barges used were what are called ""dumb barges" -- that is to say, barges which with the exception of two small cabins at the ends of the barge, one for stowing the tackle of the barge and the other for the use of the barge, are altogether undecked and open for the reception of the cargo. The barges were brought alongside the ship by the consignees. The custom found is as I have said, that in the case of long lengths of timber the shipowner alone has to perform the operation of delivery into the barges, which, if there were no custom, would have to be performed by both parties together."

25. In the present case, there was no plea as regards the custom. Nor is there any special provision regarding loading and discharge of the timber cargo as was the case in *Norden Steam Co. v. Dempsey*. (1876) 1 CPD 654, where reference is made to the Canada Dock which is the dock where the ships carrying timber cargo are allowed to commence unloading. On a consideration of the facts, evidence, circumstances, referred to and discussed earlier, we are in agreement with the view taken by the Court below that in the present case, the carriers had no liability in respect of the cargo prior to its having been crossed the ship's tackle.

26. Yet another contention, a novel, if riot a strained one, about the time at which loading actually commences was addressed before us. The crux of the contention appears to be: the entire load of logs formed one consignment, they were taken in one boat, loading of a portion of it, is sufficient to constitute "loading of the cargo", two logs from this lot had already been loaded,; it was when the third one was up from the boat and on its way to the ship that the boat had capsized; the capsizing of the boat is therefore at a juncture when loading vis-a-vis the cargo had already commenced; or responsibility for the safety of the entire cargo had fastened itself to the carrier when the loading of the cargo in the above sense had already commenced.

27. We are unable to accept the above submission. The cargo to be loaded consisted of 23 distinct logs of timber. Merely because one or two of them have been lifted up and put on board the ship, it could not be said, as regards the entirety of the cargo, that the loading had commenced. In the present case, in relation to the two logs of timber already on its board, the ship has issued a bill of lading covering them. In the light of the available evidences and circumstances, and having regard to the nature of the cargo, we are of the view that the proper and reasonable interpretation of Clause 3 of Ext. A3 would warrant a finding that loading commences in respect of each log when it crosses the ship's tackle. As regards the entirety of the cargo which was in the boat, there was no such crossing of the goods across the ship's tackle. There is therefore no loading in relation to the entire cargo.

28. In the result, confirming the decree of the trial Court, we dismiss the appeal with costs.