(1959) 12 BOM CK 0007

In the Bombay High Court

Case No : Civil Revision Appn. 1905 of 1957

The Scindia Steam Navigation Co. Ltd. — APPELLANT

Vs

Ismain Lohmed Batatawal and Another — RESPONDENT

Date of Decision : 16-12-1959

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Article 1, 3
Carriage of Goods by Sea Rules — Rule 8

Citation : AIR 1960 Bom 416 : (1960) 62 BOMLR 265

Hon'ble Judges : Gokhale, J

Bench : Single Bench

Advocate : H.R. Gokhale and Payne and Co., Attorneys, for the Appellant; L.P. Pendse and S.R. Garg, for the Respondent

Judgement

Gokhale, J.—This is a revision filed by original defendant No. 1 Company against the decree directing it to pay an amount of Rs. 1,256-9-0 and professional costs to opponent No. 1 - original plaintiffs. The plaintiffs are inion and potato merchants. On 3rd June 1952 they shipped 91 bags of onion by S. S. Jal Rajendra to Karachi on a bill of lading, The bill of lading was sent to the Habib Bank Ltd. at Karachi. According to plaintiffs, opponent No. 2 Messrs sargodha Traders were to get this bill of lading released from the bank on payment of the amount in respect of the price of the goods so shipped. Opponent No. 2 was mentioned as the notified party in the bill of lading. On 6th July 1952 the goods, it appears,arrived at karachi and defendant No. 1 petitioner, which is the Steasship Company owning S. S. Jal Rajendra delivered to opponent No. 2 (original defendant No. 2) the 91 bags of onion on 21st July 1952, on production of all documents, except the bill of lading. As the bill of lading was not produced, opponent No. 2 gave a personal security and deposited an amount of Rs. 500/- in cash with the petitioner steamship Company. According to the plaintiffs this action of the petitioner was wrongful and resulted in a loss of Rs. 1782-5-0. That is why plaintiffs filed Suit No. 1346/6822 of 1953 in the Court of Small Causes at Bombay to recover an amount of Rs. 1256-9-0 costs of the suit and interest from the date of the suit till realisation.

2. The suit was resisted by defendant No. 1 Company inter alia on the ground that plaintiffs should have made their claim against it within one month from the alleged loss. In the present case, notice was given to defendant No. 1 on 20th March 1953 and therefore, the claim was not made within the time stipulated in the bill of lading and, therefore, plaintiffs were not entitled to any amount from the petitioners. It was further contended that the property in the case had passed to defendant No. 2, and, therefore, the delivery was mad by the petitioner company properly to defendant No. 2.

3. The trial Court came to the conclusion that the property in the suit had not passed to defendant No. 2 and petitioners'' action in delivering the goods to the second defendant without the production of the bill of lading was wrongful. As regards the contention of the defendant No. 1, that plaintiffs had not made their claim within one month of the arrival of the steamer as provided in the bill of lading, reference was made to Rule 8 in Article III of the Schedule to the Carriage of Goods by sea Act (XXVI of 1925), which provides that

"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 connection 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."

In view of this rule, the applicability of which does not appear to have been disputed in the trial Court, it was held that the condition of the bill of lading that no claim would be entertained unless it was made within one month from the date of arrival of the steampship was held to be null and void and as of no effect. It was, therefore, held that as plaintiffs had brought the suit within one year after the delivery of the goods to opponent No. 2 as required under Rule 6 Article III of the Act the petitioner was not discharged from liability. In view of these findings, the trial Court, as already stated, passed a decree in favour of the plaintiffs against the petitioner and also against opponent No. 2 original defendant No. 2, which was ex parte in the suit.

4. Against this decree, defendant No. 1 filed n appeal to the Full Court of the Court of Small Causes. In appeal, it appears three contentions were raised on behalf of the petitioner. In the first instance, it was contended that as the bill of lading contained the words "Notity to Sargodha Traders Karachi", therefore, the petitioner was entitled to deliver the goods to opponent No. 2 Sargodha Traders. That contention was negatived on the ground that the bill of lading clearly mentioned that the goods shipped were to be delivered only against the production of the bill of lading. I may mention that this contention is not pressed before me in this revision. secondly, it was contended before the Full Court that the property in the case had passed to opponent No. 2. That contention was also negatived on the ground that the bill of lading was taken by the plaintiffs to their

own order and forwarded to the Habib Bank at Karachi and, therefore, the intention of the plaintiffs was that the bank should part with the bill of lading only after payment was received from opponent No. 2 and further that defendant No. 1 was to deliver the goods only on the production of the bill of lading by opponent No. 2. I may mention that Mr. Gokhale, learned advocate appearing on behalf of the petitioner though he mentioned this point in the opening has frankly conceded that he would not be able to press this point in this revision. The third point which was argued on behalf of the petitioner before the Full Court was this: It was contended that the bill of lading contained a special condition with regard to the notice of claim and that was to the following effect:-

"No claim for short delivery, short landing, non-delivery, total loss, or any other claim whatever, in respect of the within-mentioned goods will be entertained unless made in writing within one month from the date of arrival of the vessel."

It was further pointed out that the bill of lading also contained an endorsement to the follwoing effect:

"Pershable cargo on deck at Shipper''s risk. Company not liable for non-delivery whole or partial or for any loss or damage howsoever caused." The argument on behalf of the Steampship Company before the Full Court was that both these conditions were not null and void because clause (c)) of Article I of the Schedule to the Carriage of Goods by Sea Act stated that

" ''goods'' includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." The contention of the petitioner was that as the bill of lading itelf showed that the cargo was on Deck at Shipper''s "risk" the bags of onion sent by plaintiffs would not be goods within the definition of that term in clause (c) of Article 1. Since Rule 8 of Article III would apply only to goods falling within this definition, rule 8 itself would not apply and would not, therefore, make the conditions in the bill of lading null and void, as held by the trial Court. When this argument came to be pressed before the Full Court, it was pointed out to the learned advocate appearing on behalf of the petitioner there that there was no evidence whatsoever to show that the goods were in fact carried by defendant No. 1 on deck. The Counsel appearing on behalf of the Steamship Company, therefore applied orally as well as by written application to the Full Court requesting that the company should be allowed to lead evidence the the goods were actually carried on deck S. S. Jal Rajendra. thatapplication was disallowed by the Full Court on the ground that if the defendant No. 1 wanted to claim exemption from the provisions of the Act it should have led evidence to show that the goods in suit were actually carried by it on the deck of the ship and, therefore, Rule 8 would ot apply. As this application for giving Defendant No. 1 an opportunity to lead additional evidence was rejected and as there was no evidence on record to show that the cargo was in fact carried on eck, the third contention raised on behalf of the petitioner was also rejected by the Full Court. The result was that the trial Court''s decree came to be confirmed by that Court. It is against this decision that the present revision application has been filed.

5. The only point that has been argued by Mr. Gokhae, on behalf of the petitioner, is that the plaintiff relied in his plaint on the terms and conditions of the bill of lading. These terms and conditions of the bill of lading. These terms and conditions were specifically referred to by defendant No.l in the written statement which it was pointed out in paragraph 5 that the bill of lading itself shoed that the cargo shipped was perishable cargo and was on Deck at Shipper''s risk and the Company was not liable for non-delivery whole or partial, or for any loss or damage howsoever caused. It was further urged that in paragraph 6 of the written statement the defendant had contended that the goods were shipped as per the bill of lading dated 3rd June 1952. In view of these averments, Mr. Gokhale contends that the trial Court should have applied its mind as to whether Rule 8 of Article III of the Schedule to the Act applied to the present case or not. It is further contended that in the trial Court plaintiff did not dispute that the cargo in question was carried by the petitioner-Company on the deck, as mentioned in the bill of lading. If that be so, it is argued that there was no question of the petitioner-Company failing to lead any evidence in support of its averment. I am not prepared to accept this argument. It is no doubt true that the bill of lading contains an endorsement that the cargo was on deck at Shippers risk. But, the definition o "goods" in clause (c) of Article I of the Schedule to the Act shows that the cargo would not be goods if by the contract of carriage it is stated as being carried on deck and is so carried. It is obvious, therefore, that a mere statement in the contract of carriage that the goods are on deck would not be sufficient to exclude such cargo from the definition of the terms ''good''. It would be necessary for the Steamship Company also to prove that the cargo in question was in fact carried on the deck of its ship. Now, whether the cargo was carried on the deck, as stated in the bill of lading was a fact which was within the special knowledge of the petitioner-Company and the burden would be on the company to lead evidence to prove that it was so carried. It is thus that the petitioner in the written statement referred to the terms of the bill of lading. In the additional defences, Defendant No. 1 also contended that the claim should have been made by the plaintiffs within one month of the arrival of the steamship at Karachi, as provided in the bill of lading. But when this defence was answered by the plaintiffs stating that such a condition would be null and void on the ground that it would fall within the mischief of Rule 8 of Article III of the Schedule to the Act, the defendant should have countered it by saying that that rule would not apply because the goods in this particular case were not goods as fell within the definition of the term "goods" in Clause C of Article 1. In my view, therefore, the contention that it was not necessary for the Steamship Company to lead any evidence because it was common ground between the parties that the goods were carried on the deck of the ship is without any substance.

6. As I have already mentioned, in the Full Court an application was made on

behalf of the Steamship Company to allow them to lead additional evidence to establish that the goods were actually carried on deck. That application was disallowed by the Full Court on grounds which seem to me to be sound and Mr. Gokhale has not been able to attack that decision on any substantial ground.

7. The result is that there is no substance in this revision application and the rule will be discharged with costs.

8. Rule discharged.

