PRIVY COUNCIL

Nippon Yusen Kaisha

Vs.

Ramjiban Serowgee

P.C.A.No.36 of 1937
(Lord Wright, Lord Romer, CJ. Sir Lancelot Sanderson, Lord Normand, (Lord President, Court of Session) and Sir ShadiLal.JJ.)

11.03.1938

JUDGMENT

LORD WRIGHT J.

1. The appellants in this appeal, a Japanese ship-owning company, have been held liable to pay to the respondents, who are brokers and merchants at Calcutta, damages representing the value of certain consignments of jute gunny bags. Before explaining the issues in the case, it will be convenient to state in briefest possible outline the material facts and documents. On 4th May 1926, the respondents entered into three contracts with three mills respectively for the purchase of a total quantity of 250 bales. On the same day they sold the same quantity of 250 bales to a company called the International Export Company, Ltd., carrying on business in Calcutta, who will be referred to as the Export Company. The conditions of all the contracts were identical, the form used being the ordinary form approved by the Indian Jute Manufacturers Association. This is the form under which the entire export business in gunnies in Calcutta is conducted. Clauses 3 and 4 of the terms and conditions are material :

> 3. Payments to be made in cash in exchange for Delivery order on sellers or for Railway receipts or for Dock receipts or Mates' receipts (which Dock's receipts or Mates' receipts are to be handed by a Dock or ship's officer to the seller's representatives.)
> 4. The buyers hereby acknowledge that so long as such Railway receipts or Mates' receipts (whether in sellers' or buyers' name) are in possession of the sellers, the lien of the sellers as unpaid vendors subsists both on such Railway receipts or Dock's or Mates' receipts and the goods they represent until payment

in full.

2. The contracts stipulated for delivery free alongside export vessel in the port of Calcutta. The Export Company in due course had engaged freight from the appellants. The terms of the engagement are taken as evidenced by a document called a shipping order from the appellants' Calcutta branch to the ship's commanding officer. It was there stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta and that the receipt of cargo issued by the ship (that is the Mate's receipt) must be exchanged for bill of lading. On 4th May 1926, the Export Company gave shipping instructions to the respondents, which they passed on in the same terms to the three mills. On 17th and 18th May 1926, two of the mills sent alongside certain parcels to the Moji Maru, and the remaining quantities were sent to the HokataMaru. These two vessels were owned by the appellants, who received the parcels in accordance with the shipping engagement between themselves and the Export Company, and issued Mate's receipts as presented to them for signature by the mills; these receipts were in the following terms:

> Received on board ... for conveyance to Kobe from the Export Company the under- mentioned goods subject to the terms and conditions of the Company's Bills of Lading.

3. These receipts were severally delivered to the mills' sircars, who had tendered with the goods a request to the steamer in the following terms:

> Please receive on board from the above mills the undernoted goods, shipping documents for which have been taken out in the name of Messrs. International Export Co. Ltd., and hand the Mate's receipt to our sircar.

4. In three cases on the same day as the Mate's receipts were severally given and in one case on the following day, the appellants issued the respective bills of lading describing the goods as shipped by the Export Company and deliverable to order at Kobe, without the Mate's receipts being given in exchange, but a letter of guarantee or indemnity was in each case taken from the Export Company by the appellants. At these several dates the respondents were not themselves in possession of the Mate's receipts which they obtained from the mills a few days later against payment. When they thus obtained the Mate's receipts they tendered them to the Export Company, who defaulted in payment. Thereupon the respondents on 27th May 1926, gave notice in writing to the appellants that they had an unsatisfied lien or claim for the price and were entitled to retain the relative Mate's receipts, and that bills of lading must not be issued by the appellants until Mate's receipts were surrendered to them. By that time

however the Export Company, having the bills of lading in their possession, had resold the goods to purchasers in Japan and had drawn bills of exchange for the price on the purchasers. These bills of exchange they had discounted with a bank (sometimes referred to in the proceedings as the Taiwan Bank, but in fact the International Banking Corporation, a subsidiary of the National City Bank of New York), and had endorsed to them by way of security the bills of lading. On 12th June 1926, the respondents as they could get no satisfaction from the Export Company and as the appellants replied that they had passed bills of lading on the shipper's (that is, the Export Company's) own letter of guarantee and referred the respondents to the shippers, issued their writ, claiming payment of the price from the Export Company and damages from the appellants. In due course the vessels, the Moji Maru, having sailed on 19th and the HokataMaru on 4th June 1926, proceeded to their destination, and the goods were delivered at Kobe on presentation of the bills of lading. An application which had been made by the respondents for an injunction and interim receivership of the goods while the ships were still at sea had been ordered to stand over till the trial.

5. At the trial, which took place in July 1929, the Export Company did not appear and judgment went against them. But the Judge, Buckland J. dismissed the suit as against the appellants. He held that the appellants could not be held liable to the respondents for issuing the bills of lading without having the Mate's receipts unless they had received notice of the respondents' lien or claim before they did so. For this purpose the written notice of 27th May 1926 was too late. He rejected the respondents' evidence that oral notice had been given on 14th May 1926. "Admittedly," he held on the evidence, "it was a common practice" at the port of Calcutta to issue bills of lading without Mate's receipt. He curtly negatived the contention that the respondents had a special property in the goods which was violated by the delivery at Kobe to the bill of lading holders, so that the respondents were entitled to damages as in trespass or conversion The respondents having appealed, judgment was given by the Court of Appeal on 22nd July 1930. Rankin C. J., who delivered the leading judgment, agreed with the trial Judge that the appellants were guilty of no breach of duty in issuing the bills of lading to the Export Company which was named as shipper in the Mate's receipts. He gave his reasons for this conclusion shortly as he had already more fully discussed the point in giving judgment in an appeal heard by the Court immediately before, *Nippon Yusen Kaisha v. MahaliramRamjidas,* But he held that the respondents had a special property or right of possession in the goods, and that the notice of lien and other demands were sufficient to render the appellants guilty of conversion for

that notwithstanding the notice and demands, they delivered the goods under the bills of lading, because, he said:

> An indorsee of a bill of lading cannot make a better title to the goods than his indorser upon the principle of purchaser for value without notice.

6. But as he was of opinion that section 178, Contract Act, might entitle the Bank to claim as against the respondents a better title than the Export Company to the goods, he ordered a remand to determine that issue. Ghose J., concurred with the Chief Justice, while Lort-Williams J. dissented.

7. Buckland J. who tried the issue, held that the transaction was of the most ordinary and normal kind in every way and that there was no question on the evidence before him of any want of good faith or of any circumstance that would raise any presumption whatever that the Bank was acting improperly. This finding came before the Court of Appeal which reversed the finding of the Judge, and held that judgment should be entered for the respondents against the appellants for a sum to be agreed or ascertained. Derbyshire C. J., with whom the other members of the Court agreed, held that the onus was on a party seeking to rely on section 178, to establish affirmatively that he acted in good faith and under circumstances which were not such as to raise a reasonable presumption that he acted improperly, and that the appellants had failed to discharge that onus. The present appeal is from the judgment so entered against the appellants.

8. The matters to be decided in the appeal are, first, whether the appellants in issuing bills of lading without having the Mate's receipts committed a wrong as against the respondents, and secondly, whether by delivering to the bill of lading holders they converted the respondents' goods that is goods in which the respondents had an immediate right of possession as against the indorsees of the bill of lading which was infringed by the delivery from the ships at Kobe. If both these questions are answered in the negative, the third question which has been dealt with by the Court of Appeal and debated before this Board, does not arise.

9. Issue 1 to be determined is when under the contract the property passed. The sale was of unascertained goods. Prima facie, on such a sale, the property in the goods passes when goods answering to the contract description are unconditionally appropriated to the contract with the assent of the buyer, which in this connexion does not mean expressed assent, but simply that the appropriation has been made in the manner contemplated by the parties. This prima facie rule may however be varied by

the terms of the contract or even by a reservation made by the seller in the act of appropriation. The general rule is that the property passes when the parties intend it to pass. In the present case, the sale being free alongside, the property prima facie passes when the goods are appropriated by delivery alongside in implement of the contracts. It is however said that clause 3 of the contract precludes the passing of the property until the price is paid against the Mate's receipts or the other documents specified. That would no doubt be so if clause 3 were not followed by clause 4. The contract must however be read as a whole. Clause 4 provides for a lien of the sellers as unpaid vendors on the Mate's receipts or other documents so long as they remain in the sellers' possession, and on the goods, until payment in full. Can this be reconciled with the reservation of the jus disponendi which clause 3 would import if it stood alone? That depends on the meaning to be attributed to the word "lien" as used in regard to the goods. A Common law lien is possessory and depends on possession, but it also presupposes that the property in the goods has passed. A person cannot have a lien on his own goods. Thus clause 4 imports that notwithstanding clause 3 the property has passed when the goods were delivered alongside, that is, placed in possession of the shipowners. The result is that the sellers have parted with both property and possession. "Lien" must therefore be used in a different sense as meaning either an equitable lien or a hypothecation such as that discussed by this Board in *Madras Official Assignee v. Mercantile Bank*or the Common law right or license to resume possession, such as that discussed in *Howes v. Ball,* The result is that the sellers had, after delivery alongside, nothing left except the equitable charge which is only enforceable by equitable remedies against the buyers or person taking with notice of the equity or a license to resume possession which is personal or contractual as between the sellers and buyers. In neither case was there left to the sellers a Common law or possessory lien, which if it existed would have been a right in the nature of property and would have supported an action in conversion or trespass. The importance of this conclusion in the present case will appear later.

10. A different state of things would have resulted if the sellers had delivered the goods to the ship in their own name as shippers, so that the ship would have held the goods on their behalf. But they did not. They delivered the goods as being shipped by the Export Company and took a Mate's receipt which expressly stated the name of the Export Company as shippers. In this way the ship received the goods on behalf of the Export Company who had booked the freight from the shipowners. All that the sellers had was possession of, or a lien on, the Mate's receipt. It is, however, on this fact, coupled with the terms of the challan or document delivered to the ship by the mills

with the goods and also on the course of business that the respondents rely as justifying their first claim, which is that the issue of the bills of lading to the Export Company, without production of the Mate's receipt was a wrongful act by the appellants as against them, which deprived them of their security on the goods and caused them damage equivalent to the full value.

11. The Mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however, prima facie evidence of the quantity and condition of the goods received and prima facie it is the recipient or possessor who is entitled to have the bill of lading issued to him. But if the Mate's receipt acknowledges receipt from a shipper other than the person who actually receives the Mate's receipt and in particular if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will prima facie be entitled and indeed bound to deliver the bill of lading to that person. So it was held by BaconV. C. in *Hathesing v. Laing,* a case in principle not different on its facts from the present. It was held that the indorsement of the Mate's receipt did not transfer a property which overrode that given by the indorsement of the bill of lading, which had been issued without production of the Mate's receipt, though the latter was held as security by the person to whom it had been issued. In that case, as in this, the person who delivered the goods to the ship took the Mate's receipt describing the debtors as the shippers. No doubt if the shipowner, before he issues the bill of lading, is given express notice that he is not to issue the bill of lading without the Mate's receipt or to anyone but the person who delivered the goods, he cannot disregard that notice. Even without express notice, he may be affected by notice to the same effect by knowledge of the actual circumstances of the case. *Hathesing v. Laing,* was decided in 1873 and has been treated as good law ever since, as for instance in the late Judge Carver's "Carriage of Goods by Sea," Section 60. Indeed it is difficult to see what other course a shipowner in a case like this could, in the absence of notice, adopt. He is bound to deliver bills of lading for the goods to the shipper; the shipper here is beyond question the Export Co. who engaged the freight, who are owners of the goods, who are described in the document presented by the mills as the persons in whose name shipping documents have been taken out, and whose names appeared in the Mate's receipts as the persons from whom the goods were received. The mills, who at the respective dates of the Mate's receipts had not been paid by the respondents, might have given notice of lien on their own or the respondents' behalf, or they might have

inserted the names of themselves or the respondents as persons shipping the goods and persons to whom the Mate's receipts were to be given. If that were done, the appellants could not properly have issued bills of lading to the Export Co. But if the mills or the respondents had taken the bills of lading in their own name as shippers, they would have become liable on the bill of lading contract and in particular for payment of advance freight. It was not till 27th May 1926, that express notice was given to the appellants not to issue bills of lading, but it was then too late to close the stable door. An attempt to prove express notice given on 14th May 1926, which would have been in time, completely failed. Various matters were relied upon as amounting to implied or indirect notice. It was said that the direction in the mills' document that the receipts were to be given to the mills' sircars amounted to sufficient notice, especially when coupled with the course of business in the trade according to which payment is to be made against the Mate's receipts, which thus constitute a sort of security. But as the receipt itself acknowledges shipment by the Export Co., the mere direction to give the receipt to the mills' sircar appears to be too obscure and ambiguous to countervail the clear recognition of property in the Export Co. There might be many reasons why the receipt should be given to the person who actually delivered the goods to the ship. It is admitted by witnesses on both sides that bills of lading were frequently issued without Mate's receipts against an indemnity. Such an indemnity is a common commercial precaution in use all over the world whenever bills of lading are issued without Mate's receipts, and no sinister inference can be drawn from its being taken. It is true that the Export Co. had obtained bills of lading in several cases from the appellants against an indemnity without producing Mate's receipts, and that the appellants had been complaining and demanding delivery of the Mate's receipts, but vendors must have been in some measure aware of what was being done ; it is suggested that they did not wish to make trouble with the shippers, the Export Co. who seem to have been doing a large business until the crash came about the end of May 1926. There is no finding of any fraudulent collusion between the Export Co. and the appellants, or indeed any evidence of that nature.

12. Under all the circumstances of the case, not only was there no timeous express notice to the appellants, but there is no ground for imputing implied notice. The case must be regarded as one in which shipowners who for their own protection stipulated with the shippers that bills of lading were to be given in exchange for Mate's receipts, waived that provision, and without notice issued bills of lading to the named shippers and owners of the cargo. It would impose an unprecedented burden on shipowners if under such circumstances they were held responsible. Their Lordships agree with the

conclusion of Sir George Rankin C. J. on this issue.

13. Issue 2 is alternative. It proceeds on the footing that bills of lading were delivered to the Export Co., but none the less, it is contended, the bills of lading in the Export Co.'s hands did not dispossess the respondents of their unpaid vendor's lien, or the lien for which they stipulated, because they continued to hold the Mate's receipt, and thus they had a right to immediate possession as against the appellants, so that they were entitled to sue in conversion when their notice of 27th May 1926, and their subsequent demands for the goods were refused by the appellants. The primary question thus is whether the respondents still possessed a right to possession, sufficient to found a claim in conversion. The appellants in reply not merely contest the contention that by the possession of the Mate's receipts the respondents retained their lien, but say that the bills of lading had been indorsed to the Bank so as to put an end to the right (if any) of stoppage in transitu, and that they were bound to deliver the goods to the indorsee of the bills of lading which they duly did.

14. The learned Chief Justice on this point was in favour of the respondents, though as already stated, he ordered a remand on the issue based on section 178, Contract Act, 1872, which was then in force, though since repealed in 1930. Their Lordships with all deference find themselves unable to concur in this conclusion in the respondents' favour. It seems to be based on two propositions, first that under the contractual terms, coupled with the retention of the Mate's receipts, the respondents retained a lien or immediate right to possession, which was a property interest and not merely an equitable or personal right or license, and secondly, that as the indorsement of a bill of lading passed no better title than the indorser had, the indorsement and transfer to the Bank, passed no greater rights than the Export Company had, so that the Bank could not claim delivery from the shipowners in defeasance of the respondents' possessory title. It is however clear that the conclusion of Sir George Rankin C.J. depended on his view that the respondents had a right in law to immediate possession : indeed it was properly conceded before their Lordships that only such a right would entitle the respondents to claim in conversion, and that a merely equitable right or contractual right or license would not do. Their Lordships agree with Sir George Rankin in his view that the general property passed to the Export Company, but differ from him for reasons stated earlier in this judgment in his view that a right at law to possession remained in the respondents. Thus the whole basis of his conclusion fails.

15. It is true generally that a bill of lading is not a negotiable instrument in the sense that a bill of exchange is, and that the transferee of a bill of lading does not get a better

title than his transferor. But while that is true of title in law, it cannot be asserted in regard to equitable rights. The legal right given by a possessory lien can indeed be distinguished from the general legal property in a thing. This is illustrated by *Pease v. Gloahec,* That case however also illustrates the distinction between legal and equitable rights. The documents of title in that case had been obtained by fraud from the lawful possessor, who had not the general property which belonged to those guilty of the fraud. It was held that an indorsee from those latter persons in good faith for value got a good title, and not a merely defeasible title and in that sense got a better title than his transferors whose possession was defeasible. This is the general rule where the transferor has a title defeasible for fraud, but the transferee takes in good faith and for value. Another illustration of an equitable right which is defeated by the transfer of a bill of lading to a *bona fide*indorsee for value is the right of stoppage in transitu. It follows from the same general rule that the equitable lien or personal license which in their Lordships' judgment was all that remained with the respondents when the goods were delivered to the ship, did not affect the transferee of the bill of lading so as to found a claim for conversion, though it might indeed found a claim for breach of contract against the Export Company, or a claim for equitable relief against them or any assignees subject to the same equities, a category which would not include the appellants.

16. In respect of the matters discussed above, there is no difference in substance between English and Indian law. This conclusion renders it unnecessary for this Board to give a decision on the issue raised on the remand under section 178. It seems however proper for their Lordships to say that as at present advised they would prefer the judgment of Buckland J. to that of the Court of Appeal. Even assuming that the onus of proof under the section is on the appellants, it would seem that they discharged it by the evidence of the Bank, which showed that the transaction was a banking transaction of the most ordinary and normal character. If it were necessary to look further, the presumption of good faith would complete the proof. But their Lordships are far from satisfied that under the section the onus would have lain with the defendants. There are in the section two separate provisos. The onus of proof under the second proviso cannot, it seems, be on persons in the position of the defendants, and if so, it would seem to follow that the onus as to the first proviso must likewise rest in the same quarter. Otherwise an anomalous result would follow. Decisions under other statutes have been cited. But it is always dangerous to seek to construe one statute by reference to the words of another. It may well be that in this section the plaintiff who seeks to impugn what is ex facie a valid disposition should be

held to assume the burden of showing bad faith and such other matters as the provisos require to be established in the particular case.

17. Their Lordships, on the whole case, are of opinion that the appeal should be allowed, the orders of the Court of Appeal should be set aside, and the orders of Buckland J. restored, and that the respondents should pay the appellants' costs in the Court of Appeal and before this Board. They will humbly so advise His Majesty.

Appeal allowed.

Cases Referred.

(1931) 18 AIR Cal 269=134 IC 82=52 C LJ 365 (SB).

, (1934) 21 AIR PC 246=152 IC 730=61 IA 416=58 Mad 181=1935 AC 53=104 LJ PC 1=152 LT 170=40 Com Cas 143

(1827) 7 B and C 481=1 M and R 288=6 LJ (OS) KB 106=31 RR 256.

(1874) LR 17 Eq 92=43 LJ Ch 233=29 LT 734=2 Asp MC 170

(1874) LR 17 Eq 92=43 LJ Ch 233=29 LT 734=2 Asp MC 170

(1866) LR 1 PC 219=3 Moore PC (NS) 556=35 LJ PC 66=12 Jur (NS) 677=15 LT 6=15 WR 201.