

Shipping Corporation of India Ltd. and Another

Vs

Nissar Export Corporation

Civil Appeal No. 2725 of 1979

(CJI Y. V. Chandrachud, A. C. Gupta JJ)

03.12.1980

JUDGMENT

Y. V. CHANDRACHUD, C.J. –

1. We want to be as brief as possible because we do not want any of our observations to affect the merits of the case. The case has to go back to the High Court for disposal of the appeal on merits for reasons which we will presently mention.

2. This appeal by special leave arises out of a suit filed by the respondent for recovering a sum of Rs. 1,01,594 by way of damages together with interest at 6 per cent per annum on Rs. 76,735 from the date of suit till the date of recovery. Respondent is a private limited company carrying on business in export and import. The first appellant is the Shipping Corporation of India Limited, Bombay while the second respondent (sic appellant), a private limited company, is its agent. The respondent obtained a written shipping order for shipping 5000 packages of onions and moved the entire cargo alongside the steamer M. V. "Chidambaram", which was berthed at North Quay of the Madras Port on October 28/29, 1973. The cargo was intended to be exported to Malaysia. It appears that while the loading operations in regard to some other cargo were going on, there were showers at the Madras Port, light or heavy we do not want to say. The case of the respondent is that while the cargo was being loaded on a "first come first served" basis and as his turn was due near about the midnight of October 31, 1973, the shipping company, the first appellant, announced that in accordance with the instructions of its agent the second appellant, loading of the Madras cargo would be stopped by giving preference to the cargo from Nagapattinam. The case of the respondent is that Nagapattinam cargo was given a "preferential and discriminatory treatment", as a result of which his cargo was not accepted for loading. The respondent sold the onions in the local market thereafter as a result of which, according to him, he suffered a loss, for the recovery of which he brought the present suit on the original side of the Madras High Court.

3. On the pleadings of the parties the learned Trial Judge framed six issues, one of which, namely, issue No. 4 was as to whether there was discrimination in shutting out the respondent's cargo. After considering the entire evidence in the case the learned Judge dismissed the suit.

4. The respondent filed an appeal before a Division Bench of the Madras High Court against the decision of the learned single Judge. The Division Bench by its judgment dated April 3, 1979, set aside the judgment of the Trial Judge and remanded the suit to him for disposal in the light of the observations contained in its judgment. It is this order of remand which is challenged by the appellants in this appeal.

5. The respondent has made the following averments in paragraph 6 of the plaint :

At this juncture, suddenly, the plaintiffs were informed that in accordance with the second defendant's instructions, the loading authorities would stop the loading of the Madras cargo and would have to load the entire Nagapattinam Onion cargo first and then only ours would be loaded, which amounted to preferential and discriminatory treatment given to Nagapattinam cargo, though the same reached Madras harbour much later than October 30, 1973. The decision to load the Nagapattinam cargo even in the space allotted to the Madras cargo is deliberate and with some objective. The reasons given viz., that at Nagapattinam the sea is rough, hence Nagapattinam cargo has to be loaded, is an afterthought since the cargo space booked for Madras cargo has also been utilised for Nagapattinam cargo for some reason best known to them. They have, therefore, not exercised their discretion bona fide and reasonably. Despite our strong protest, the second defendant took on board the entire Nagapattinam cargo, even while it was raining and closed the hatches leaving our ENTIRE LOT besides few other Madras party's partial consignment and the ship sailed leaving behind our PERISHABLE cargo, even though our space was booked. By so doing the second defendants have not only discriminated but also shown undue favouritism, thereby exposed both the defendants to criticism and damages for which both the defendants alone are responsible.

6. The defect which the Division Bench found in the case of the appellants is that the averments contained in paragraph 6 of the written statement were not traversed by them. Those averments, according to the Division Bench, had therefore to be deemed to have been admitted. Dr. Chitale, who appears on behalf of the appellants has drawn our attention to the whole of the written statement filed by his clients from which it seems to us clear that the averments made by the respondent in paragraph 6 of the plaint have been specifically traversed and denied by the appellants. It is true that none of the paragraphs of the written statement refers expressly or numerically to paragraph 6 of the plaints but that is a matter of form and not of substance. The various averments contained in paragraphs 5 and 7 to 10 of the written statement are specifically directed at the averments made in paragraph 6 of the plaint. The case made out by the respondent in paragraph 6 of the plaint is that the appellants gave a discriminatory preference to the Nagapattinam cargo and refused to accept the Madras cargo without any valid reason. The appellants have given specific and elaborate reasons as to why it became necessary to load Nagapattinam cargo before completing the loading of the Madras cargo.

7. In paragraph 5 of the written statement of the 2nd appellant which was adopted by the 1st appellant, it is stated that according to the conditions of the shipping order, the appellants could not be made responsible for the cargo which was shut out. In paragraph 7 of the written statement it is stated that (a) the export cargo is loaded on a turn-wise basis; (b) the vessel M. V. Chidambaram encountered rain from October 29 to November 2; (c) the vessel was to sail from Madras on October 31 and call at Nagapattinam on November 1; (d) the Port Officer at Nagapattinam informed on October 28 that the weather conditions prevailing there were not conducive for the embarkation of the passengers or the loading of goods; (e) it was decided for that reason to embark all the passengers at Madras itself and to load the Nagapattinam cargo at Madras and that, accordingly, the Nagapattinam cargo was brought to Madras; (f) since the complete cargo could not be loaded without causing undue delay in the departure of the ship, a part of the cargo had to be necessarily shut off; and (g) that a passenger vessel cannot be detained merely for the reason that the loading of the cargo is not complete. In paragraph 8 of the written statement it is stated that steps had to be

taken for the proper loading of consignments as any contract with the rain-water would have resulted in total deterioration of onions and that no preferential treatment was given to any of the persons whose cargo was accepted for loading. In paragraph 9 it is stated that as far as the Madras cargo is concerned, space was allotted to the persons who had moved their cargo to the ship's side on a turn-wise basis and that the shut out of the respondent's cargo, amongst that of others, was due to force majeure. Finally, in paragraph 10 of the written statement it is stated that no special favour was shown to any of the shippers, that the ship had sufficient space to carry the entire cargo but that it could not do so due to adverse weather conditions and that it was not true that the respondent's cargo was shut out deliberately.

8. We are unable to understand how, in view of these averments in the written statement, it can be said that the allegations made by the respondent in paragraph 6 of the plaint have not been traversed by the appellants. We are of the opinion that those allegations have been fully and effectively traversed by the appellants and therefore the learned Trial Judge was justified in disposing of the suit on the basis of the issues framed by him in the suit.

9. We might mention that the respondent-plaintiff did not contend in the trial Court, that the allegations contained in paragraph 6 of the plaint were not traversed by the appellants and should therefore be deemed to have been admitted. No objection was raised to the learned Trial Judge raising an issue on the matters stated in paragraph 6 of the plaint. We do not think that the respondent should have been permitted in these circumstances to raise for the first time in the appeal the contention that a part of his claim must be deemed to have been admitted for the reason that it was not traversed in the written statement.

10. Since the Division Bench of the High Court has not considered the merits of the appeal, we set aside its judgment and remand the appeal to it with the direction that it shall dispose of the appeal on merits on the basis that the material averments made by the respondent in the plaint have been traversed and denied by the appellants by their written statement.

11. Costs of this appeal will be costs in the appeal in the High Court.

</html