

SUPREME COURT OF INDIA

Shaw Wallace & Co.Ltd .

Vs.

Nepal Food Corpn. & Ors.

C.A.No.7100 of 2001

(R.V.Raveendran and H.L.Gokhale,JJ.,)

13.10.2011

JUDGMENT

R.V.Raveendran,J.,

1. Civil Appeal No.7100/2001 Shaw Wallace & Co. Ltd., the appellant herein, was the second defendant in suit No. 922/1979 filed by Nepal Food Corporation ('NFC' for short, plaintiff in the suit and first respondent herein) for recovery of 1,26,38,951/06. UPT Imports Exports Ltd., the second respondent herein, was the first defendant in the said suit. The appellant filed this appeal by special leave, aggrieved by the judgment dated 14.9.2001 of a division bench of the Calcutta High Court dismissing its appeal (Ap.No.323 of 1988) against judgment and decree dated 9.9.1987 passed by a learned single Judge of that court decreeing the suit filed by the first respondent in part. For convenience we will also refer to the parties by their ranks in the suit.

2. NFC entered into a contract dated 7.12.1977 with Ngoh Hong Hang Pvt. Ltd., Singapore (for short 'NHH' or the 'buyer') for sale of 10000 MT of parboiled rice-1978 crop, (as also other quantities of rice). As per the contract, the payment was to be made by the buyer by establishing an irrecoverable confirmed and transferable letter of credit confirmed by Rashtriya Banijya Bank, Kathmandu in US dollars in favour of the seller allowing part payment. The contract provided that the payment 100% invoice value shall be made at sight at the seller's bank on presentation of 'on board Bills of Lading' (or charterparty Bills of Lading) supported by seller's commercial invoice. In pursuance of it, Bangkok Bank Ltd., Hong Kong who were the buyer's bankers, issued an irrecoverable letter of credit dated 25.4.1978 (amended/extended on 25.5.1978 and 31.8.1978) for US \$ 21,60,000, in regard to the price of 10000 MT of Nepal paraboiled rice. The validity period of the said letter of credit was originally upto 30.6.1978, the last date for shipment being 20.6.1978. This was extended from time to time and the validity period of the letter of credit was extended from time to time, finally up to 15.1.1979, with the last date for shipment being extended to 31.12.1978.

3. UPT Imports Exports Ltd. was the owner of the vessel - ` M.V. Pichit Samut'. Shaw Wallace represented itself to be the agent of the owner of the vessel. The said vessel `Pichit Samut' was chartered by NHH (buyer of rice from NFC) from the owner of the vessel under charterparty agreement dated 11.10.1978 for carrying 5000 MT of rice to be shipped by NFC to NHH, from Calcutta to Penang, Malaysia. M/s Grand Fortune Singapore Private Ltd., (for short `Grand Fortune') was the general agent of the owner of the vessel. In accordance with Charterer's request to assign the said vessel under the agency of appellant for the said fixture, the said general agent acting on behalf of the owners, appointed Shaw Wallace (second defendant) as the `Owner's Protective Agent' on 16.10.1978. Shaw Wallace was also acting as the charterer's agent as per charterer's request dated 3.1.1979. M/s Asian Agency was the agent of the seller (NFC) who was the shipper of the goods.

4. Shaw Wallace addressed a letter dated 6.11.1978 to Asian Agency (NFC's agent) informing that the vessel Pichit Samut was due to arrive at Sandheads, Calcutta on 8.11.1978, that there was insufficient cargo at the Port and that all expenses for delays, if any, would be to the shipper's (seller's) account. Shaw Wallace informed Asian Agency by letter dated 8.11.1978 that the vessel Pichit Samut had arrived at Sandheads, Calcutta and served a notice of readiness (that the vessel was ready to receive cargo). The said notice of readiness was accepted by Asian Agency on 28.11.1978 when the vessel arrived at berth (23 K P D) after it was certified to be fit for loading by the surveyor. The loading of rice in the ship was commenced on 29.11.1978 and completed on 4.12.1978. Several mate's receipts were issued between 29.11.1978 to 4.12.1978 to Asian Agency on behalf of the master of the ship acknowledging the receipt of goods as and when received. The ship sailed from the Port of Calcutta to Penang on 4.12.1978.

5. The general agent of the shipowner - Grand Fortune, advised Shaw Wallace by telex message dated 5.12.1978, not to issue Bills of Lading to NFC until advised, in view of the dispute between the charterer and the shipper in regard to the "lay days". At this juncture it is necessary to refer to the background facts relating to the said dispute. When the vessel arrived at Garden Reach Anchorage on 9.11.1978, the vessel was passed as fit for loading, by the surveyors. On 9.11.1978, NFC did not have sufficient goods to load and therefore the vessel was birthed at 28 KPD. The vessel was programmed to shift from 28 KPD to 23 KPD on 16.11.1978, but could not be shifted on account of Port Workers strike. After the strike was called off, the vessel moved from 28 KPD to 23 KPD on 28.11.1978. Asian Agency therefore accepted the notice of readiness dated 8.11.1978, only on 28.11.1978. According to Shaw Wallace, Asian Agency ought to have accepted the notice of readiness as soon as the ship berthed at the port on 9.11.1978. According to Asian Agency, the vessel could be said to be ready only when it berthed at 23 KPD which was on 28.11.1978 and therefore there was no delay on its part. The dispute was as to whether the shipper should bear the demurrage charges if any for the lay days between 9.11.1978 to 28.11.1978. It is in this background the said telex dated 5.12.1978 was issued by Grand Fortune. This was followed by another telex dated 12.12.1978 from Grand Fortune, forwarding a telex communication from NHH requiring the ship-owner to advise its agent Shaw Wallace to obtain a bank guarantee from NFC regarding demurrage before issuing the Bills of Lading, to avoid disputes over payment of demurrage and stating that if it was not done, it (NHH) will not be responsible for any

demurrage incurred. In view of it, Grand Fortune instructed Shaw Wallace to require NFC to furnish a bank guarantee for issuing and releasing the bills of lading. On 13.12.1978, Shaw Wallace sent a statement of facts pertaining to the arrival and loading of Pichit Samut. As per the standard practice, Shaw Wallace supplied the blank forms of bills of lading to NFC for being filled and returned. NFC's agent delivered the mate's receipts and the duly filled forms of bills of lading to Shaw Wallace on 17.12.1978 with a request to sign and issue the bills of lading as the agent of the owner of the vessel. Shaw Wallace's statement of facts was returned by NFC's agents with remarks on 19.12.1978.

6. Pichit Samut arrived at Penang on 18.12.1978. NHH took delivery of the goods from the vessel at Penang on 22.12.1978 without possessing any document of title and apparently without the knowledge of the NFC. Asian Agency - NFC's agent, addressed a telex message dated 1.1.1979 to Shaw Wallace regretting that bills of lading had not been delivered to them, despite delivering the mate's receipts and that therefore, Shaw Wallace would be responsible for all delays and damages, as NFC was unable to negotiate the letter of credit in the absence of bills of lading. NHH sent the following telex dated 3.1.1979 to Shaw Wallace:

"As you are aware, we wish to counter claim demurrage from shipper..... Since the owner requires charterers/shippers to provide first class international prime bank guarantee to pay freight, dead freight and demurrage before issuing bills of lading, it is proper for us to request shipper to submit first class international prime Bank Guarantee to pay the demurrage prior to releasing of bills of lading and subject to our telex confirmation before. Kindly act as an agent on our behalf to do the needful and possible and we will be responsible for all possible legal action."

It should be noted that by then NHH had taken delivery of the cargo from Pichit Samut. Shaw Wallace sent a telex message dated 3.1.1979 informing Asian Agency that the Carrier had advised not to issue the bills of lading until NFC furnished a bank guarantee towards demurrage and that the ship- owner would not be responsible for the delay in issuing bills of lading, in view of delay on the part of NFC in furnishing a bank guarantee for the demurrage. The validity period of the letter of credit issued at the instance of NHH expired on 15.1.1979. Shaw Wallace by communication dated 15.1.1979 informed NFC's agent that the demurrage due in respect of M.V. Pichit Samut was US\$ 30,000 and a bank guarantee for the said amount should be furnished by the NFC or its agents so that the bills of lading could be issued. On 19.1.1979, NFC issued a notice to Shaw Wallace calling upon them to issue bills of lading and take steps to see that NHH extends the validity of the letters of credit to enable NFC to negotiate the same and realize the value of goods failing which Shaw Wallace would be held liable for all consequences. On 25.1.1979, three signed bills of lading dated 4.12.1978 were delivered by Shaw Wallace to NFC's agent (Asian Agency) in regard to 1522.727 MT, 1022.860 MT and 1901.207 MT of rice entrusted to the master of the vessel 'Pichit Samut' for transshipment to Penang. NFC issued its final invoice in regard to the consignments on 1.2.1979 and 2.2.1979.

7. NHH issued a notice dated 3.2.1979 to NFC alleging that NFC was liable in damages in a sum of US\$ 13,41,242.38 for several breaches, that is short-supply of 1521.52 MT of

parboiled rice and non-supply 11573 MT of white rice and demurrage in regard to delaying three vessels. NFC issued a notice dated 25.9.1979 to NHH claiming US\$ 59,12,191.07 towards the value of rice supplied. NFC also issued a legal notice dated 29.11.1979 to UPT Imports Exports and Shaw Wallace claiming the value of the goods as damages, by reason of the delay in issuing the bills of lading and the wrongful delivery of the cargo to NHH without the production of bills of lading. NFC filed Suit No.922/1979 in the Calcutta High Court against the owner of the vessel (first defendant) and its agent Shaw Wallace (second defendant) for recovery of ` 1,26,38,951/06 made up of the following amounts :

“(a) Damages equivalent to the value of ` 1,05,32,459/22 4446.794 MT of rice covered by the three Bills of Lading (1522.727 MT + 1022.860 MT + 1901.207 MT) loaded on the Vessel Pichit Samut.

(b) Interest thereon at the rate of 20% per annum ` 21,06,491/84 from 4.12.1978 (date of Bills of Lading) to 3.12.1979 (date of suit).”

8. During the pendency of the said suit, NFC also filed a suit against NHH in the High Court of Singapore for recovery of US\$ 28,57,009.75 being the value of the goods supplied, (including the rice shipped through M.V.Pichit Samut and M.V.Eastern Grand). NHH raised a counter claim for US \$13,41,242/38. The said suit (Suit No.5809/1983) was decreed (by the High Court of Singapore on 22.8.1984) on admission for US\$ 11,54,575/37 for which there was no defence or dispute. NFC filed Civil Appeal No.56/1984 before the appellate court at Singapore regarding non-grant of decree on admission for the balance. However, NHH was wound up by the Singapore High Court in the year 1985, on an application by a Malaysian creditor and consequently, NFC could not recover any amount from its buyer NHH.

9. In the suit filed by NFC against the owner of the vessel and the agent (appellant), it was contended that as the bills of lading were not issued in time, the valuable security was not available for negotiation and, in the meanwhile, the validity period of the letter of credit having expired on 15.1.1979, loss was caused to NFC in respect of the value of the goods. The basis of the claim was two-fold. The first was wrongful delivery by the ship- owner (first defendant) to NHH without production of the necessary documents (bills of lading). The second was wrongful failure on the part of the ship-owner and Shaw Wallace to furnish the bills of lading within the validity period of letter of credit, thereby preventing the NFC from negotiating and recovering the amount due. While the first was a cause of action against the ship-owner, the second was a cause of action against both the ship-owner and Shaw Wallace.

10. The first defendant (owner of the vessel) did not defend the suit claim. The second defendant (Shaw Wallace) in its written statement claimed that it had merely acted as the agent of the ship-owner in regard to that particular voyage undertaken by M.V. Pichit Samut; and that it could issue the bills of lading only on the instructions of and under the authority of the first defendant. Shaw Wallace contended that as it merely acted on the instructions of the

ship-owner (first defendant), as its agent, it could not be held liable for the acts or omissions of the ship-owner. On the said pleadings, the following issues were framed:

- "1. Is the suit not maintainable as against the defendant No.2 on the grounds as stated in written statement?
2. Has there been any breach of contract on the part of defendant No.2?
3. Was there any negligence or breach of obligation on the part of defendant No.2, as alleged in paragraphs 15 and 16 of the plaint?
4. To what relief, if any, is the plaintiff entitled as against defendant No.2? "

Both parties (plaintiff and second defendant) led oral and documentary evidence.

11. After considering the evidence, a learned Single Judge, by order dated 9.9.1987, decreed the suit for ` 1,05,32,459.22 with interest at 9% per annum from the date of suit. He rejected the claim for interest from 4.12.1978 (date of bill of lading) to 3.12.1979 (date of suit). The learned Single Judge held that the suit was maintainable. He also held that Shaw Wallace was liable to pay damages to NFC on three counts:

“(i) Breach of statutory duty : The act of withholding the bills of lading by Shaw Wallace was wrongful and in violation of the statutory duty imposed by Article III, Rule 3 of the Carriage of Goods by Sea Act, 1925.

(ii) Breach of legal duty amounting to a wrongful act and negligence :

The second defendant wrongfully refused to make over to NFC, the bills of lading (which were documents of title to goods), though NFC was entitled to it on demand, in an attempt to assist the charterer (NHH) in realizing its purported claim. As a result of this wrongful act of Shaw Wallace, NFC suffered loss and damages to the extent of the value of the said goods.

(iii) Conversion : Both ship-owner as well as Shaw Wallace acted inconsistently with the rights of NFC, in respect of the said bills of lading and such wrongful acts amounted to conversion of the said bills of lading which were documents of title to the goods, and thereby caused damages and injury to the plaintiff to the extent of the value of the said goods.”

12. Feeling aggrieved, Shaw Wallace filed an intra-court appeal. A Division Bench of the Calcutta High Court by impugned judgment dated 14.9.2001 dismissed the said appeal. The division bench affirmed the finding that the appellant was guilty of breach of a statutory duty and breach of a legal duty which amounted to negligence. It however clarified that Shaw Wallace was guilty of conversion of bills of lading which constituted title to the goods and

not conversion of goods. The division bench rejected the contention of the appellant that it was the duty of the master of the ship who took charge of the goods to issue the bill of lading and not that of the agent. It held that Shaw Wallace had an obligation to issue the bills of lading within the validity period of the letter of credit. It also held that by the appellant's failure to issue the bills of lading, NFC was unable to negotiate the letter of credit and consequently lost the value of the goods.

13. The said judgment and decree of the appellate bench of the High Court is challenged in this appeal. At the outset, it should be noticed that in this appeal, we are neither concerned with the liability of the buyer/charterer (NHH) nor with the liability of the owner of the vessel (UPT Imports Exports). The decree against the owner of the vessel who remained *ex parte* is not under challenge. We are only concerned with the role played by Shaw Wallace as the carrier's agent and the question whether it was liable for the suit claim. The High Court has not made Shaw Wallace liable as an agent, for any acts of omission or commission by its principal (the ship owner). Nor has the High Court made the agent (Shaw Wallace) liable by binding it to any contract made by the principal (ship owner). The High Court has made Shaw Wallace liable in view of its breach of a statutory duty and negligence to perform its legal duty in common law. Therefore, the limited question that arises for our consideration in this appeal is whether there is any ground for interference, in regard to the concurrent finding of the learned Single Judge and the division bench holding that the appellant- Shaw Wallace committed breach of its statutory duty and also breach of its legal duty amounting to negligence and wrongful act and consequently liable to pay to NFC the value of the goods by way of damages.

14. Section 2 of the Indian Carriage of Goods by Sea Act, 1925 ('Act' for short) provides that subject to the provisions of the said Act, the rules set out in the schedule 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. Section 4 provides that every bill of lading issued in India shall contain an express statement that it is to have effect subject to the provisions of the rules contained in the schedule to the Act. The schedule to the said Act contains the rules relating to bills of lading. Clause (a) of Article I of the Schedule defines the term 'carrier' as including the owner of charterer who enters into a contract of carriage with a shipper. "Contract of carriage" is defined in clause (b) of Article I thus :

"(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same :"

Article III deals with the Responsibilities and Liabilities of Carriers by Sea. Rule 3 thereof which is relevant for our purpose, is extracted below :

"3. After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall, on demand of the shipper issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(c) The apparent order and condition of the goods: Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking."

15. Halsbury's Laws of England (4th Edition, Vol. 43(2) Shipping & Navigation : Pages 1042 and 1043) deals with the 'Right to receive bill of lading' and 'effect of mate's receipt'. We extract below the relevant portion therefrom :

"1544. Right to receive bill of lading. The person who at the time of shipment is the owner of the goods is entitled to receive a bill of lading and to have it made out in accordance with his instructions. If he is refused a bill of lading, or if the terms of the bill of lading offered differ from those which he is entitled to require, or if his instructions are not complied with, he may demand the redelivery of his goods, and a refusal to redeliver them, when so demanded, amounts to a conversion of them by the shipowner. The shipowner is not discharged from his responsibility to the owner of the goods merely on the ground that a bill of lading has already been signed and handed over to a third person who was believed in good faith to be the owner."

"1545. Effect of mate's receipt. Possession of the mate's receipt prima facie entitles the holder to receive a bill of lading. Therefore, on its production, in the absence of notice that the holder is not the owner, the master or other agent of the shipowner is justified in signing a bill of lading and delivering it to the holder in exchange for the mate's receipt."

The following observations relating to mate's receipt in Scrutton on Charterparties and Bills of Lading (Twentyfirst (2008) Edition] are relevant:

"On delivery of goods by a shipper to the shipowner or his agent, the shipper will, unless there is a custom of the port to the contrary, obtain a document known as a "mate's receipt".... As a general rule, the person in possession of the mate's receipt, where one exists, is the person entitled to bills of lading, which should be given in

exchange for that receipt and he can sue for wrongful dealing with the goods." [page 162] After the shipment of goods under a contract of affreightment, the bill of lading is signed by the carrier or his agent and delivered to the shipper, in exchange for the mate's receipt." [page 62] The standard method of preparing bills of lading is stated in CARVER's Carriage by Sea (Thirteenth Edition, vol. 1, Page 41 Para 54) thus :

"The bills of lading are usually procured by the shipper, and filled by him with statements of the kinds and quantities of the goods, and the marks upon them. These are checked on behalf of the ship, and documents are signed on behalf of the master, by the ship's agent, and delivered to the shipper."

16. NFC did not engage the vessel Pichit Samut. It was chartered by the buyer NHH to carry the goods purchased by it from NFC. The contract of carriage was governed by the terms of the charterparty agreement dated 11.10.1978. As per the said charterparty agreement, if the ship was delayed, the Charterer (NHH) was responsible to pay the demurrage and the agreement provided that the demurrage should be settled at Singapore, twenty days after discharge of the cargo at Penang. Thus NFC did not have any obligation towards the owner of the vessel to pay either the freight or any demurrage charges. If there was any delay for which NFC was liable, that was a matter to be sorted out by NHH making a claim against NFC. As per the sale contract dated 7.12.1977 between NFC as seller/shipper and NHH as the buyer, the seller (NFC) was entitled to payment of the entire invoice value, at sight at the seller's bank, on presentation of the "on board Bills of Lading" supported by its commercial invoice. NFC had secured its interest by ensuring that the buyer opens an irrevocable letter of credit and by making the supply during the currency of the letter of credit. The shipper (NFC) was certain of obtaining payment from the Bank under the buyer's letter of credit, by merely producing before the bank, the bills of lading and the invoice. The shipper was entitled to the bills of lading from the agent of the shipowner, immediately on production of the mate's receipt. Therefore, the mere fact that delivery was taken by the buyer (NHH) at Penang even without the bills of lading would not have caused any loss to the seller, if it had been issued the bills of lading to which it was entitled, without delay so that it could have realized the amount against the letter of credit which was valid and in force till 15.1.1979. NFC lost the value of goods on account of Shaw Wallace not releasing the bills of lading before 15.1.1979, even though it was liable to issue the bills of lading on 17.12.1978.

17. The delivery of the goods on board the ship was completed on 4.12.1978. On 17.12.1978, Asian Agency presented the mate's receipt along with the filled forms of bills of lading to Shaw Wallace and demanded the issue of signed bills of lading. Issue of mate's receipt on behalf of the master of the ship was the authority and instruction to the agent of the shipowner to issue the bills of lading to the shipper. The likelihood of a dispute between the charterer/buyer and shipper/seller regarding demurrage for lay days was not sufficient to suspend the authorization given by issue of the mate's receipt. But Shaw Wallace did not issue the bills of lading in spite of Asian Agency furnishing the mate's receipts and duly filled forms of bills of lading. Thereafter, Asian Agency made a further demand by telex on 1.1.1979. Shaw Wallace replied that the ship-owner wanted a bank guarantee towards payment of demurrage before the release of bills of lading, without indicating the amount for

which the bank guarantee was to be given. By this process, issue of the bills of lading which was legitimately due on 17.12.1978 was postponed beyond 15.1.1979, on which date the letter of credit ceased to be operative. The bills of lading were ultimately issued on 25.1.1979. Having regard to Rule 3 of Article III of the Schedule to the Act, there was a statutory duty cast upon Shaw Wallace as agent of the carrier, to issue the bills of lading, without delay. Shaw Wallace was aware of the relevance and importance of bills of lading. By deliberately delaying the issue of the bills of lading from 17.12.1978 to 25.1.1979, Shaw Wallace committed a breach of statutory duty cast under Article III (3) of the Schedule to the Act. It also acted negligently in performance of its legal duty in common law to issue the bills of lading on delivery of the mate's receipt, as the agent of the ship-owner. Thus it became liable to pay damages to make good the loss, namely the value of the goods covered by the bills of lading. For this purpose it is immaterial whether Shaw Wallace was aware or unaware of the fact that the Letter of Credit was expiring on 15.1.1979. The contention of Shaw Wallace that it was acting merely on the instructions of the shipowner in refusing to issue the bills of lading till furnishing of a bank guarantee and therefore not liable, is rejected.

18. The appellant made a belated attempt to avoid liability by contending that it was not responsible or liable for the issue of bills of lading, that only the master of the ship who received the goods, had to issue the bills of lading, and that NFC having permitted the ship to leave the port without obtaining the bills of lading, could not require the agent to issue the bills of lading. The well recognized practice relating to carriage of goods by sea is that where a consignment is loaded/received on board on different dates, the person in charge of the vessel issues mate's receipts acknowledging the quantity received, as and when the goods are received. On completion of delivery of goods by the shipper, on production of the mate's receipts, the bills of lading would be issued to the shipper either by the master of the vessel or by the agent of the shipowner. In this case, at the relevant time, Shaw Wallace represented to NFC and its agent (Asian Agency) that it was the agent of the carrier and did all acts expected to be carried out by the carrier's agents, that is informing the shipper's agents about the arrival of the ship by issuing notice of readiness and by calling upon the shipper's agent to load the cargo. It issued to the master of the vessel, the mate's receipt book, bearing printed caption of `Shaw Wallace & Co. Ltd.,' thereby making it clear that it was acting as an agent of the carrier. The mate's receipt forms issued by Shaw Wallace for use by the master of the ship clearly contained a printed provision that the bills of lading could be obtained at the agent's office. Shaw Wallace corresponded and dealt with the shipper's agent in all matters with reference to the shipment and furnished the blank forms of bills of lading to the shipper's agent. Shaw Wallace also received the mate's receipt and duly filled forms of bills of lading from Asian Agency on 17.12.1978 without any protest. Ultimately, the Shaw Wallace did issue the bills of lading. Therefore, it is too late in the day for Shaw Wallace to contend that it was not liable to issue the bills of lading. It is also significant that Shaw Wallace never informed NFC or Asian Agency before the vessel left Calcutta on 4.12.1978 or even thereafter, that it did not have the authority to issue the bills of lading or that it would not issue bills of lading in view of any default on the part of NFC. On the other hand, it held out till the ship left the port that it was the carrier's agent and it will issue the bills of lading in lieu of the mate's receipt. It did not express any reservation or objection when it issued the

blank forms of bills of lading to Asian Agency for being filled or even when the mate's receipts and filled forms of bills of lading were delivered to it on 17.12.1978. Even in the letter dated 28.12.1978 addressed to the Asian Agency, it merely stated that readiness of the ship to receive goods would commence from 9.11.1978 and not 26.12.1978. More than 15 days after receiving the mate's receipts and filled form of bills of lading, on 3.1.1979, for the first time, Shaw Wallace raised the issue of furnishing a bank guarantee for payment of demurrage amount before releasing the bills of lading. Even in this letter, it did not mention the amount of demurrage for which the bank guarantee was to be issued. The demurrage amount was mentioned for the first time by letter dated 15.1.1979. Therefore, even if NFC wanted to give a bank guarantee, it could not have given a bank guarantee before 15.1.1979 as the amount for which bank guarantee was required, was not notified. On 15.1.1979, the letter of credit expired. Therefore, it is clear that the Shaw Wallace alongwith the ship-owner (first defendant) was jointly and severally responsible for the loss caused to the NFC. The liability of Shaw Wallace arises by reason of breach of a statutory duty and by reason of its negligence in performing its legal duty to release the bills of lading when demanded. Whether the delay on the part of the Shaw Wallace in issuing the bills of lading was on account of negligence or on account of mala fides, makes no difference, in so far as its liability is concerned.

19. Once a mate's receipt is issued to the shipper on delivery of the goods to the ship, issue of bill of lading in respect of such goods cannot be postponed on any ground except where the person claiming the bill of lading is not the shipper. Once the mate's receipt is issued to the shipper (or its agent) and the demand for issue of a bill of lading in terms of the mate's receipts is made by the shipper (or its agent), the owner of the vessel is bound to issue the bill of lading and cannot deny or delay the issue of the bill of lading. If the arrangement was that the agent of the owner of the vessel will issue the bill of lading, or if the owners' agent had held out that it will issue the bill of lading, the agent cannot withhold the bills of lading once the mate's receipt is issued, irrespective of any instructions to the contrary, issued by the owner of the vessel subsequent to the issue of mate's receipt and departure of the vessel with the goods from the port. If the issue of bill of lading is denied or delayed as a consequence of which the shipper suffers loss, the owner of the vessel and its agent will jointly and severally be liable to make good the loss by way of damages.

20. The appellant next contended that even if it is held liable in damages, the amount claimed was erroneous. It is pointed that NFC has claimed in the plaint (Annexure D to the plaint) that the value of 4446.794 MT of parboiled rice was ` 1,05,32,459/22. The appellant further pointed out that as per the contract rate of US\$ 216 per MT, the value of 4446.794 MT would be US\$ 960,507. It is pointed out that in the plaint in its suit filed against NHH in the High Court of Singapore, NFC had shown the value of 4446.794 MT as US\$ 960,507. According to the appellant, as per the prevailing exchange rate when the loss occurred, the rupee equivalent of US\$ 960,507 was ` 77,80,110/- (at the rate of ` 8.10 per US Dollar) and therefore, the claim of ` 1,05,32,459/22 was excessive, erroneous and even if the plaintiff should succeed, the decree should be only for ` 77,80,110/-. We have carefully considered the said contention. It is seen that the appellant in its written statement did not raise the contention that the exchange rate was ` 8.10 per US Dollars at the relevant time and the

Indian rupee equivalent of the value of the rice in US Dollar would be only ` 77,80,110/-. Significantly, even when the learned Single Judge decreed the suit for ` 1,05,32,459.22, the appellant did not raise this contention in the memorandum of appeal in the intra-court appeal. Again, when the appeal by the appellant was dismissed by a division bench of the High Court and the special leave petition was filed before this Court, the appellant did not raise this contention in the special leave petition. Apart from the absence of pleadings, there is no material on record to show the date with reference to which the exchange rate was calculated, (that is, whether it was 4.12.1978 or 15.1.1979 or 25.1.1979 or 3.12.1979) or to show the exchange rate on the relevant rate. In the absence of any plea in the written statement and in the absence of any ground in the memorandum of appeal or special leave petition, and the absence of any material, the appellant cannot during arguments, raise this issue which involves examination of disputed questions of fact. The said contention is therefore liable to be rejected.

21. In the view we have taken, it is wholly unnecessary to consider the several decisions on unrelated issues relied upon by both sides. The decision of the High Court that the appellant is jointly and severally liable along with the owner of the vessel does not call for any interference. The appeal is therefore, liable to be dismissed.

Civil Appeal No.7099/2001

22. Shaw Wallace, the appellant was the third defendant in a suit (Suit No.1010 of 1979) filed by Nepal Food Corporation (plaintiff in the suit and first respondent herein) for recovery of ` 95,67,537/31. Thy Shipping Parma SA, the second respondent herein, was the first defendant in the said suit. Eastern Steamship & Enterprises (S) Ltd., and Khemka & Co. (Agencies) Pvt. Ltd., respondents 3 and 4 herein were the second and fourth defendants respectively in the suit. The appellant has filed this appeal aggrieved by the judgment dated 14.9.2001 of a division bench of the Calcutta High Court dismissing its appeal (Appeal No.322 of 1988) against judgment and decree dated 9.9.1987 passed by a learned single Judge of that court decreeing the suit filed by the first respondent.

23. The plaintiff entered into a contract dated 7.12.1977 with Ngoh Hong Hang Pvt. Ltd., Singapore (for short `NHH' or the `buyer') for sale of certain quantities of Nepal parboiled rice. As per the contract, the payment was to be made by the buyer by establishing an irrecoverable confirmed and transferable letter of credit confirmed by Rashtriya Banijya Bank, Kathmandu in US dollars in favour of the seller allowing part payment. The contract provided that the payment 100% invoice value shall be made at sight at the seller's bank on presentation of `on board Bills of Lading' (or charter party Bills of Lading) supported by seller's commercial invoice. In pursuance of it, Bangkok Bank Ltd., Hong Kong who were the buyer's bankers, issued an irrecoverable letter of credit dated 25.4.1978 for US \$ 21,60,000, in regard to the price of 10000 MT of Nepal parboiled rice. The validity period of the said letter of credit was originally upto 30.6.1978, the date of shipment latest by 20.6.1978. This was extended from time to time and the validity of the letter of credit was extended up to 15.1.1979 and the date of shipment was extended to 31.12.1978. (vide communication dated 26.10.1978 of Rashtriya Banijya Bank).

24. Thyse Shipping Parma SA, the first defendant was the disponent owner (main charterer) of the vessel - `M.V. Eastern Grand under a charter arrangement with the owner of the vessel -- M/s Eastern Steamship & Enterprises (S) Ltd., the second defendant. The said vessel `Eastern Grand' was sub-chartered by NHH (buyer of the rice) from Thyse Shipping under a charterparty agreement dated 14.11.1978 for carrying 4500 MT of rice supplied by NFC, from Calcutta to Penang, Malaysia. Khemka & Co. (Agencies) Pvt. Ltd., the fourth defendant was the Owner's Protective Agent. Shaw Wallace was the agent of the owner of the vessel, at Calcutta. M/s Asian Agency was the agent of the seller (NFC) who was the shipper of the goods.

25. Shaw Wallace addressed a letter dated 18.11.1978 to Asian Agency (NFC's agent) informing that the vessel Eastern Grand was due to arrive at Calcutta on 22.11.1978, and NFC should be ready to load the rice on that date. Shaw Wallace informed NFC's agent by letter dated 22.11.1978 that the vessel Eastern Grand had arrived at the port at Calcutta on 21.11.1978 and served a notice of readiness. The said notice of readiness was accepted by NFC's Agent on 4.12.1978. The loading of goods was commenced on 5.12.1978 and continued upto 12.12.1978. As loading could not be completed for want of entire quantity of rice, the ship was shifted from its berth on 12.12.1978. The ship was again re-berthed on 27.12.1978 and loading was resumed and completed between 27.12.1978 to 29.12.1978. Several mate's receipts were issued between 5.12.1978 to 29.12.1978 to Asian Agency on behalf of the ship acknowledging the receipt of goods (in all 3434.291 MT) as and when received. The ship sailed from the Port of Calcutta to Penang on 30.12.1978.

26. The disponent owner of the vessel (Thyse Shipping) advised Shaw Wallace by telex on 1.1.1979, not to issue bills of lading to NFC until a bank guarantee was furnished by NFC in regard to demurrage charges and dead freight charges (for the period of delay between 12.12.1978 and 27.12.1978). On 1.1.1979, Khemka & Co. sent a statement of facts-cum-lay time sheet relating to Eastern Grand to Asian Agency for signature and return. On 2.1.1979, Shaw Wallace informed Asian Agency that as per the instructions of its Principal (owner of the vessel), through the protective agents, the bills of lading could not be released until receipt of confirmation that charterer/shipper had provided a bank guarantee acceptable to the ship owner to pay the freight, dead freight and demurrage due to the ship owners.

27. Eastern Grand arrived at Penang on 16.1.1979 and NHH took delivery of the goods from the vessel at Penang between 16.1.1979 and 19.1.1979 without having the authority of the bills of lading. In the meanwhile, the validity period of the letter of credit issued by the buyer expired on 15.1.1979. Shaw Wallace by communication dated 15.1.1979 informed Asian Agency that the total demurrage and dead freight due in respect of M.V. Eastern Grand was US \$77,000 and a bank guarantee for the said amount should be furnished by the NFC or its agents so that the bills of lading could be issued.

28. As per the standard practice, Shaw Wallace supplied the blank forms of bills of lading to Asian Agency for being filled and returned. Asian Agency delivered the mate's receipts and the duly filled bills of lading to Shaw Wallace on 18.1.1979 with a request to sign and issue

the bills of lading as owner's agent. Asian Agency sent a notice dated 19.1.1979 to Shaw Wallace demanding the immediate release of the bills of lading and requiring it to ensure extension of the letter of credit to enable NFC to negotiate the same, failing which Shaw Wallace would be held liable for all consequences. Shaw Wallace received a telex dated 24.1.1979 from the ship owner, giving clearance to release the bills of lading. On 29.1.1979, Shaw Wallace delivered three signed bills of lading dated 28.12.1978 and 29.12.1978 to NFC's agent (Asian Agency) in regard to 3366.170 MT of rice entrusted to the master of the vessel 'Eastern Grand' for transshipment from Calcutta to Penang. NFC issued its final invoice in regard to the consignments on 2.2.1979.

29. NHH issued a notice dated 3.2.1979 to NFC alleging that NFC was liable in damages for short-supply of 1521.52 MT of parboiled rice and non-supply 11573 MT of white rice, apart from being liable to demurrage for three vessels, in all US\$ 13,41,242.38. NFC issued a notice dated 24.9.1979 to NHH claiming US\$ 59,12,191.07 in regard to the supplies made (including quantities shipped in M. V. Eastern Grand and M. V. Pichit Samut). As there was no response, NFC also issued a legal notice dated 10.12.1979 to Shaw Wallace and Khemka & Co. claiming ` 95,67,537/31 being the value of the goods covered by the three bills of lading as damages, for the wrongful delivery of the cargo to NHH.

30. NFC filed Suit No.1010/1979, in the Calcutta High Court against the disponent owner of the vessel (charterer), the owner of the vessel, Shaw Wallace and Owner's Protective Agent Khemka & Co. (Agencies) Pvt. Ltd., (fourth defendant) for recovery of ` 95,67,537/31 as damages for the loss and damage suffered by it. In the suit filed by NFC, it was contended that as the bills of lading were withheld, the valuable security was not available for negotiation and, in the meanwhile, the validity period of the Letter of Credit having expired on 15.1.1979, loss was caused in respect of the value of the goods. The basis of the claim was two-fold. The first was wrongful delivery by the first defendant to the buyers. Second was wrongful failure to furnish the bills of lading thereby preventing the NFC from negotiating and recovering the amount due. While the first was the cause of action against the Thye Shipping (first defendant) the second was a cause of action against both Thye Shipping and Shaw Wallace.

31. Defendants 1, 2 and 4 did not contest the suit. Shaw Wallace (third defendant) in its written statement contended as follows : (a) it did not issue the bills of lading to NFC because it was bound by the instructions of its principal; (b) a suit against an agent of a disclosed principal was not maintainable; (c) it was in no way concerned with the delivery of the cargo since its role was limited to that of an agent with the responsibility of getting the goods loaded; (d) it had no knowledge of the opening of the letter of credit or the expiry date thereof; and (e) it was in no way concerned with the main contract of sale of rice between NFC and NHH. Issues were framed similar to those in the case of Pichit Samut. Both parties (plaintiffs and second defendant) led evidence - both oral and documentary.

32. As already mentioned (vide para 8 above), during the pendency of the said suit, NFC also filed a suit against NHH in the High Court of Singapore for the value of the goods supplied, but could not recover any amount as NHH was ordered to be wound up in the year 1985.

33. After considering the evidence, a learned Single Judge, by judgment dated 9.9.1987, decreed the suit for ` 95,67,537/31 against Thy Shipping (second respondent) and Shaw Wallace (appellant) with interest at 9% per annum from the date of suit (24.12.1979). The learned Single Judge held that the suit was maintainable. He also held that Shaw Wallace was liable to pay damages to NFC as claimed. Feeling aggrieved, Shaw Wallace filed an intra court appeal. The division bench of the Calcutta High Court, by impugned order dated 14.9.2001 dismissed the said appeal. The reasonings of the learned Single Judge and the Division Bench are broadly the same as the reasoning in the case of `Pichit Samut'. The said judgment and decree of the High Court is challenged in this appeal by special leave.

34. We have already noticed that the appeal is limited to the role of Shaw Wallace as the carrier's agent and its liability. The legal position has been discussed while dealing with the case of Pichit Samut. The decision of the High Court was upheld in the case of Pichit Samut solely on the ground that in view of the delay on the part of Shaw Wallace in releasing the bills of lading, NFC could not present the bills of lading and invoices and receive payment against the letter of credit before its expiry on 15.1.1979. In the case of Pichit Samut', the mate's receipts were delivered and the demand for bills of lading was made on 17.12.1978, the cargo were delivered to the NHH on 22.12.1978 and bills of lading were issued on 25.1.1979, after the expiry of the letter of credit on 15.1.1979. We therefore held that if Shaw Wallace had delivered the bills of lading when demanded, NFC could have realized the value of the goods long prior to 15.1.1979 when the letter of credit expired and that on account of its failure to release the bills of lading before 15.1.1979, NFC was prevented from realizing the value of the rice supplied.

35. But the facts are completely different here. As noticed above, the goods were loaded between 5.12.1978 and 29.12.1978. The vessels sailed on 30.12.1978. The letter of credit expired on 15.1.1979. The goods were cleared at Penang between 16.1.1979 to 19.1.1979. It was only on 19.1.1979, after the expiry of letter of credit and after the goods were delivered to NHH, that the NFC tendered the mate's receipts and requested for issue of bills of lading from Shaw Wallace. Even if Shaw Wallace had delivered the bills of lading on the day of demand namely on 19.1.1979 itself, NFC could not have realized the amount against the letter of credit. Shaw Wallace could be made liable only if it had committed breach of statutory duty or breach of any other legal duty amounting to negligence causing loss to the NFC. In this case, having regard to the fact, that the letter of credit had expired on 15.1.1979 long prior to the tendering of mate's receipt and demand for bills of lading, the delay of nine days in issuing the bills of lading had no relevance. As noticed above, even if the bills of lading had been issued forthwith on 19.1.1979, it would not have been of any assistance.

36. After referring to the oral evidence, the High Court inferred that it would be highly improbable that the holder of the mate's receipts would delay the making of a demand for blank bills of lading forms. The learned Single Judge recorded a finding that Asian Agency was demanding the blank bills of lading forms from Shaw Wallace from 30.12.1978 and that Shaw Wallace did not supply the blank forms to Asian Agency until 17.1.1979.

Consequently the learned single Judge reasoned that the demand for bills of lading was being prior to 15.1.1979 and therefore, for the reasons stated in the case of Pichit Samut, Shaw Wallace was liable to pay damages equal to the value of the goods. The division bench affirmed the said findings.

37. There is no reference in the plaint, to the demand for the blank forms of lading on and from 30.12.1978 by Asian Agency. Asian Agency did not send either any letter or telex to Shaw Wallace demanding the issue of bills of lading or the blank forms of bill of lading for purposes of filling up at any time prior to 17.1.1979. Asian Agency did not tender the mate's receipts prior to 17.1.1979. The first communication in writing from Asian Agency to Shaw Wallace after the ship left on 30.12.1978 was when it sent the mate's receipts and the filled forms of bill of lading to Shaw Wallace for issuing bills of lading, under cover of letter dated 19.1.1979, which is extracted below:

"We enclose under notes MR's & B/L's with 3 original copy for issuing B/L. M/R No.4,5,6,7,8,9,10,11,12,13,14,15,16,17, 18,19,20,21,22,23,24, 25,26,27,28,29,30,31,32,33, 34,35, 37,38,39,40, 41,42,43,44,45, 46 for 26680 bags Nepal Parboiled medium rice for Malayasa. MR No. 38,47,48,49,50,51,52, 53,54,55,59 for 25 409 bags LPN Malayasia Nepal Parboiled Medium rice. M.R.No. 1,2,3,56,57,58 for 15,791 bags Nepal Parboiled Medium rice 1978 for Port Penanag."

38. On the same day, that is on 19.1.1979, Asian Agency also sent a notice through counsel to Shaw Wallace demanding that immediate steps be taken for release of bills of lading relating to Pichit Samut and Eastern Grand and for extension of validity of the letters of credit from the buyers so as to enable NFC to negotiate the same and realise the proceeds. We extract below the relevant portions of the said notice :

"We have been instructed that the above m.v. Pichit Samut was loaded with 4539 gross tones Nepal Rice and the loading was completed on the 4th December, 1978. The other vessel m.v. Eastern Grand was also loaded by our clients with 3434 gross tones of Nepal Ribel and such loading was completed on the 29th December, 1978. on completion of the loading the Mate Receipts were duly issued by the respective Steamers to our said clients. Our clients in their turn forwarded to you the forms of the Bills of Lading duly filled in together with the Original Mate Receipts and such documents were submitted for m.v. Pichit Samut on the 17th December, 1978 and for m.v. Eastern Grand on the 18th January 1979. You are aware that as per the normal practice the bills of lading are exchangeable against the original Mate receipts which you as steamer agents were obliged to issue in favour of our clients. It is regretted that although the formalities as aforesaid were duly complied with by our clients you did not release the necessary Bills of Lading to our clients and although you knew fully well that without such bills of lading and other documents our clients could not be negotiate the letter of credit in connection with the said shipments."

Significantly, the above notice refers to forwarding of the duly filled forms of bill of lading in regard to Eastern Grand on 18.1.1979 (the date should be 19.1.1979). It does not refer to any earlier demand by Asian Agency for issue of blank forms of bills of lading from 30.12.1978 or any other date. It does not refer to any earlier demand for issue of bills of lading. Similarly in the notice dated 10.12.1979 issued by NFC through counsel to Shaw Wallace, there is no reference to any demand earlier to 19.1.1979. If really NFC and Asian Agency were seriously pursuing the matter, we fail to understand why no letter or telex was sent either by NFC or by Asian Agency making a demand for issue of blank bill of lading forms or insisting upon the issue of bills of lading by tendering the mate's receipts. Even assuming that there was any oral demand for bill of lading forms on 30.12.1978 as found by the High Court, it was evident NFC and its agent had taken the matter in a casual manner presumably expecting a further extension of letter of credit. In the circumstances, it cannot be said that there was any default, negligence or delay on the part of Shaw Wallace in issuing the bills of lading prior to 17.1.1979. The learned Single Judge and division bench have found that there was a demand for blank forms of bill of lading from 30.12.1978. Accepting the said finding will not help NFC as there is no finding that the mate's receipts were tendered or delivered with a demand for issue of bills of lading prior to 19.1.1979. The High Court has failed to consider this important aspect and wrongly assumed that breach, default, delay could be attributed to Shaw Wallace, in issuing the bills of lading, even before the mate's receipts were tendered on 19.1.1979. The decisions of the learned Single Judge and division bench of the High Court can not therefore be sustained.

Conclusion

39. In view the above, the appeals are disposed of as follows:

“(i) CA No. 7099/2001 (Re: Eastern Grand) is allowed and the judgment and decree of the High Court in so far as it decrees the suit against the appellant is set aside. The decree against the second respondent herein (first defendant in the suit) is not disturbed.

(ii) CA No. 7100/2001 (Re: Pichit Samut) is dismissed and the judgment and decree of the High Court is affirmed.

(iii) Parties to bear their respective costs.”