

CALCUTTA HIGH COURT

Textiles and Yarn (P) Ltd

Vs

Indian National Steamship Co

(B.C. Mitra, J.)

29.01.1964

JUDGMENT

B.C. Mitra, J.

1. This is a suit for recovery of Rs. 2040/- as damages for loss of goods in course of transit from Madras to Calcutta. The plaintiff's case is that out of a lot of 25 bales which were shipped two bales were short-landed. According to the plaintiff, the goods were duly booked, bearing proper markings of the consignor and the consignee, but due to negligence of the defendant or its servants and agents the full quantity of 25 bales were not lauded. The plaintiff obtained delivery of 23 bales only. The plaintiff, therefore, claims the sum of Rs. 2040/- as damages.

2. The case as made out in the plaint is that on or about February 20, 1957 Messrs. Keshavlal Talakchand of Madras shipped 25 bales of yarn by the defendant's steamship S. S. "Shivaratna". A bill of lading was issued by the defendant in respect of the shipment, and under the terms there-of the defendant was to carry the goods from the Port of Madras to the Port of Calcutta. The plaintiff claims to be the owner of the said goods consigned and is the endorsee or holder for value of the said bill of lading.

3. On or about February 27, 1957 the ship arrived at the Port of Calcutta and it is alleged that the cargo was discharged until March 8, 1957. The plaintiff took delivery of the consignment on March 15, 1957 and March 19, 1957, from the Commissioners for the port of Calcutta and it was then found that two bales were short delivered and accordingly "not found" remark was recorded with the Port Commissioners on March 19, 1957. Thereafter on or about May II, 1957, a short landing advice, known as 'B' form was issued by the Port Commissioners to the plaintiff. According to the plaintiff, only 23 bales instead of 25 bales were discharged by the ship. It is alleged that the plaintiff has suffered loss in Rs. 2040/-for non-delivery of the two bales and the plaintiff claims the said sum as damages.

4. By a letter dated May 30, 1957 the plaintiff submitted its claim for the sum of Rs. 2040/- against the defendant. The plaintiff's claim was supported by material documents.

5. In the written statement it is alleged that the defendant is the carrier on hire subject to the provisions of the Carriage of Goods by Sea Act (Act XXVI of 1925) and rules framed thereunder and also subject to the provisions of the conditions embodied in the bill of lading. The defendant denies that the plaintiff is the owner of the said consignment of 25 bales of cotton yarn or that it is an endorsee or holder for value of the said bill of lading. It is also denied that the vessel discharged cargo till March 8, 1957. The defendant also denies that two bales were short landed or that the "not found" remark was recorded with the Commissioners for the Port of Calcutta. It is alleged that the defendant's liability ceased when the consignment was discharged from the vessel on March 3, 1957 and passed into the custody of the Commissioners for the Port of Calcutta. The defendant also denies the issue of and authority of the Port Commissioners to issue, the short landing advice known as 'B' form. It is denied that only 23 bales out of 25 bales of cotton yarn were discharged from the ship and it is alleged that two bales being defaced with 'nil' marks were received by the Port Commissioners and were lying with them. There is a denial that the plaintiff has suffered loss in the sum of Rs. 2040/-. It is further alleged that the claim of the plaintiff was made out of time and cannot be entertained. The allegations of negligence and carelessness on the part of the servants and agents of the defendant are also denied. It is further alleged that it was due to the negligent manner of the shipper or owner of the goods in not giving marks which should remain legible till the end of the voyage, that the marks became defaced and as such the defendant is not liable for any claim for damages. It is alleged that the plaintiff's claim in this suit has been extinguished and there is no enforceable claim. On the above pleadings the following issues were settled:

ISSUES:

1. Was the right to sue extinguished by lapse of time of one year as provided in Clause 3 Article III para 6 of Schedule to the Indian Carriage of Goods by Sea Act?
2. Is the plaintiff owner of the goods in dispute?
3. Is the defendant absolved from all liabilities after unloading of the goods as alleged in paragraph 7 of the written statement?
4. Did the consigner declare the value of the goods prior to shipment as alleged in paragraph 9 of the written statement?
5. Is the suit maintainable?

6. To what relief, if any, is the plaintiff entitled?

6-9. (His Lordship then discussed the evidence of both the parties and continued as under:--) In the above state of evidence it is clear to me that two bales were short landed and it is very likely that two bales belonging to the plaintiff got mixed up with other goods of similar description which were carried by the ship. The result is that the plaintiff did not get two bales out of a total consignment of 25 bales. The outturn report of the Port Commissioners shows that two bales were short landed and the 'B' Form which is a certificate relating to the short landing was also only issued by the Port Commissioners. The goods appear to have been inspected at the Port Commissioners' godown and there is no reason why the plaintiff should have refused to take delivery of them if they formed part of its consignment. The defendant's witness Updhaya appears to know very little about the short landing of the two bales, which is a subject-matter of this suit. He was concerned mainly with loading and unloading of goods and his duty ended there. He said that there was another Sarkar who could say as to what had been, received from the Port Commissioners (Q. 39) but this Sarkar was not called as a witness. An attempt was made by the defendant to make the plaintiff accept the two bales of unmanifested cargo which was lying with the Port Commissioners, but the plaintiff upon inspection, found that the goods were different from its consignment and so declined to accept them. I am not convinced by the defendant's case that the loss was due to the negligence of the shippers at Madras who did not give sufficiently durable marks, and that is why the two bales were found to be missing. The question now is whether the plaintiff is entitled to recovery of damages having regard to the law on the subject.

10. It is true that it is for the plaintiff to prove that the loss occurred due to the negligence or want of skill of the defendant. But as was pointed out by G. K. Mitter, J. in *Indian Trade and General Insurance Co. Ltd. v. The Union of India*, it is the duty of the carrier to show how the consignment was dealt with during transit, as that is a matter within the special knowledge of the defendant or its servants and agents. It was held in that case:

"As the law does not cast on the plaintiff the obligation of proving how the loss arose and as it imposes on the defendant the duty of showing how the goods were dealt with while under its control, the latter must first adduce evidence disclosing its treatment of the goods and the plaintiff may rely on that evidence in addition to any tendered by him to show that the loss had occurred by reason of the defendant's default or negligence or that the loss could not have occurred but for such default or negligence. If the defendant does not adduce all the evidence at its command the plaintiff may, in proper case, ask the Court to make a presumption under Section 114(g) and to come to the conclusion that the evidence which has been withheld would have gone against the defendant".

I respectfully agree with the views expressed by G. K. Mitter, J. in the abovementioned case. In this case also the defendant has neither called any witness nor has it tendered any documentary evidence to show how the goods were dealt with by it in course of the transit. In my view the presumption under Section 114(g) of the Evidence Act should be made, on the facts of this case. I shall again refer to the judgment of G. K. Mitter, J. later in this judgment.

11. The next point to be dealt with is if the suit is maintainable by the plaintiff. It appears from the oral evidence, to which I have already referred, that the plaintiff has already recovered the amount claimed in this suit from the Insurance Company. Learned Counsel for the plaintiff also admitted that his client had received the amount claimed in this suit from the Insurance Company and had given a letter of subrogation to the latter, under the terms of which required the plaintiff to file the suit against the defendant and make over to the Insurance Company any money recovered by it in this suit. But this letter of subrogation has not been tendered in evidence nor disclosed. No oral evidence has been given about the arrangement or agreement between the plaintiff and the Insurance Company. I cannot therefore take any notice of the alleged agreement or arrangement between the plaintiff and the Insurance Company.

12. On this point reference was made to three decisions of this Court. The first case referred to is *The Union of India v. Alliance Assurance Co. Ltd.*, 66 Cal WN 419 which is a judgment of a Division Bench of this Court. In this case the goods were short-delivered and a portion of it was lost while in the custody of the Railway Administration. The Insurance Company had paid the claim of the insured, who thereupon assigned and transferred to the insurer all its right, title and interest in respect of the goods and also all claims against any person in respect thereof. The letter of assignment authorised the Insurance Company to use the name of the insured in any action which might be brought against a third party. By virtue of such assignment the Insurance Company filed the suit in its own name. In dismissing the appeal it was held that the suit by the Insurance Company is maintainable, as it was the assignee of the goods and actionable claims in respect thereof. This case is of little assistance to the plaintiff in the instant case before me because there was no assignment of the claim or of the title to the goods.

13. The next case referred to is *Alliance Assurance Co. Ltd. v. Union of India*, 62 Cal WN 539. In this case *Renupada Mukherjee, J.* held that if an Insurance Company pays for loss of an apportionable part of some goods carried by the Railway Administration, it can maintain an action in its own name against the carrier for reimbursement of the amount paid for the loss. On a construction of Section 135A(2) of the Transfer of Property Act it was held that a subrogee under that Section should not be placed in a more disadvantageous position than a subrogee under Section 92 of the same Act. It was further held that the English Law in this respect should not be followed in this country as Sub-section (4) of Section 135A of the Transfer of Property Act lays

down that Section 6(e) shall not affect the provisions of Section 135A of the Transfer of Property Act. It was further held that Section 135A(2) is based on the equitable principles of reimbursement laid down in Section 69 of the Indian Contract Act. In this case it was contended that the letter of subrogation was equivalent to an assignment of the claim of the insured but it was held that there was no such assignment of the interest of the insured in favour of the plaintiff. But although there was no such assignment it was held that a suit by the, insurer against the carrier is maintainable.

14. Sub-section (2) of Section 135A deals with the case of total loss and Sub-section (3) deals with the case of partial loss. The instant case before me is a case of partial loss and is therefore covered by Sub-section (3). But in both cases the insurer is subrogated to all the rights and remedies of the insured person as from the time of the casualty. According to Renupada Mukherjee, J. the suit by the insurer is maintainable in such a case.

15. On the other hand, G. K. Mitter, J. held in , (to which I have already referred earlier), that a suit by the Insurance Company is not maintainable unless there was an assignment of the claim. After referring to the judgment of the Judicial Committee in King v. Victoria Insurance Co. Ltd., (1896) AC 250 and the judgment of the Madras High Court in Periyamianna Marakkayar and Sons v. Banians and Co. , it was held that a subrogation of the insurer to the rights of the insured did not entitle the insurer to file a suit in its own name. The judicial Committee observed in the case referred to above:

"Subrogation by Act of Law would not give the insurer a right to sue in a Court of Law in its own name."

In the case before G. K. Mitter, J. there was subrogation but there was no assignment of the claim by the insurer to the insured.

16. It appears that the judgment of G. K. Mitter, J. was not referred to before Renupada Mukherjee, J. and was therefore not considered by His Lordship.

17. In the instant case, however, the letter of subrogation has not been tendered in evidence and I cannot therefore take any notice of the alleged rights of the parties on the basis of the said letter. In my view, the effect of the decisions discussed above is that the insurer cannot maintain an action in his own name although there is subrogation of the claims of the insured in his favour. In order to entitle him to maintain an action in his own name there must be assignment of the claim by the insured in favour of the insurer.

18. The instant case, however, is not a case of an action by the insurer as was the case in the three decisions of this Court discussed by me earlier. It is a case of a suit by the insured. The oral

evidence is to the effect that the plaintiff has already recovered his claim from the Insurance Company. The question therefore is, can the plaintiff maintain this action?

19. For the purpose of determination of the question, if the suit can be maintained by the plaintiff it is necessary to refer to Section 41 of the Indian Contract Act which is as follows:

"When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."

20. The plaintiff's right to compensation for short delivery arises from the contract of carriage of goods. The Bill of Lading lays down conditions, on the fulfilment of which, compensation for short-landing or non-delivery is payable by the defendant. The oral evidence shows that the plaintiff has recovered compensation from the insurer. The learned Advocate for the plaintiff also admitted that his client has recovered compensation claimed in this suit from the insurer. That being the position, Section 41 of the Indian Contract Act is attracted and this suit is not maintainable by the plaintiff. The provisions of Section 41 are a clear bar to a suit by the promisee if he accepts performance of the promise from a third person. That is precisely what has happened in this case. The plaintiff has accepted performance of the promise to pay compensation from the insurer and cannot therefore enforce the same claim against the defendant.

21. In this connection the learned Advocate for the defendant relied upon a decision of the Supreme Court in Lala Kapurchand Godha v. Mir Nawab Himayatalikhan Azamjah, . In this case the defendant executed a promissory note in favour of the plaintiff for Rs. 13,20,750/- due to the plaintiff as price of jewellery purchased by the defendant. The defendant declared and acknowledged in a writing dated January 31, 1937 that he purchased the jewellery at the price mentioned above. After occupation of Hyderabad by military authorities the Prince's Debt Settlement Committee decided that the plaintiff should get Rs. 20,00,000/- in full satisfaction of his claim of Rs. 27,00,000/- under the above writing. The Committee allowed interest of 6%. The appellant obtained payment of Rs. 20,00,000/- in two instalments and upon receipt of the second instalment granted a receipt that he had received payment in full and final payment of the balance of Rs. 20,00,000/- allowed by the Government in respect of his claim under the writing dated February 15, 1948 passed by the Prince of Berar in his favour, reserving, however, the right to recover the balance amount due to him. After some time the appellant filed a suit for recovery of the balance of Rs. 9,99,940/- with interest. The Supreme Court held that the case was covered by Illustration (C) of Section 63 and by Section 41 of the Indian Contract Act. It was held that the language of Section 41 was clear and the plaintiff in the suit could not recover the amount having accepted performance of the promise from a third person. It seems to me that the principle involved in this case also applies to the instant case now before me. The plaintiff has received

payment of his claim from the insurer and he cannot therefore be allowed to enforce the same claim against the defendant.

22. The effect of Section 41 of the Indian Contract Act, on a suit by the insured, who has obtained satisfaction of his claim from the insurer, prior to institution of the suit, did not arise for consideration in any of the decisions of this Court which I have discussed earlier, as in all the three cases the suits were instituted by the insurer. The question in all the three decisions was, if the suit by the insurer was maintainable.

23. My judgment on the maintainability of the action is enough to dispose of this suit, but as several other issues have been raised I shall proceed to deal with the same. The next question to be considered is if the plaintiff's right to sue was extinguished by reason of lapse of one year under Clause 3 of paragraph G of Article III of the Schedule to the Indian Carriage of Goods by Sea Act which is as follows:

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless the suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered."

24. In order to appreciate this aspect of the defendant's argument it is necessary to state that the defendant's contention is that delivery was completed on March 3, 1957 and this suit was instituted on March 15, 1958, i.e., more than one year after the date of discharge. The defendant contends that as the suit was filed beyond the time prescribed under paragraph 6 of Article III, this suit is barred, as the plaintiff's claim stood extinguished.

25. In support of this contention the learned Advocate for the defendant referred to the decision of the Supreme Court in The East and West Steamship Co. v. S.K. Ramalingam Chettiar, . In that case there was first of all a controversy as to the meaning of the word 'loss', that is to say, whether loss means the total loss of the goods or merely loss to the owner by non-delivery. The Supreme Court held that the object of the Rule is to give immunity to the carriers from claims of compensation made by owners in respect of loss sustained by them and therefore, it will be unreasonable to read the word 'loss' as restricted to only 'loss of the goods.' It was also held that loss or damage as contemplated in paragraph 6 of Article III of the Schedule to the Act is a wide expression used to include any loss or damage caused to shipper or consignee in respect of which compensation is claimed from the Shipping Company.

26. Regarding the computation of the period of one year it was held by the Supreme Court that the words "the date on which the goods should have been delivered" contemplate a case where the goods have not been delivered. The Clause gives the owner of the goods one year's time to

bring the suit and it was held that the year is to be calculated from the date of the delivery of the goods where the goods have been delivered and from the date when the goods should have been delivered where all or some of the goods have not been delivered. Regarding loss due to non-delivery the Supreme Court at p. 1064 of the report put the matter as follows:

"As we have already said the date when the goods should have been delivered necessarily contemplates a case where loss has arisen because the goods have not been delivered."

After discussing the applicability of Article 31 of the Limitation Act the Supreme Court held on the question of calculation of the period of one year, at p. 1066 of the report:

"If as regards any particular goods this duty remains unperformed at the time when the ship leaves the port there can be no escape from the conclusion that the point of time when the ship leaves the port is the latest point of time by which the goods should have been delivered."

Then again it was held that before the ship leaves the port it is not possible to say that the time when delivery should be made has expired. But once the vessel leaves the port it must be common ground between the carrier and the consignee that the time when delivery should have been made is over. The Supreme Court has put the matter as follows at the same page of the, report:

"It is this point of time, viz. the time when the ship leaves the port, which in our opinion should be taken as the time when the delivery should have been made."

27. It is thus clear that in the case of non delivery of goods carried by sea, the computation of the period of one year should be made with reference to the date when the ship by which the goods were carried leaves the port at which the delivery is to be made. In this case, however, there is no evidence of the date when the ship left the port of Calcutta. Two outturn reports were tendered being Exts. 1(a) and B1. These two exhibits are both dated May 10, 1957. It also appears that the goods mentioned in the said two outturn reports were discharged between the dates February 27, 1957 and March 3, 1957, It was contended on behalf of the plaintiff that May 10, 1957 should be taken to be the date of completion of delivery. That is the date on which the culture reports were prepared and it was contended that outturn reports are prepared on the day of the ship's departure from the port. I cannot accept this contention. There is no evidence that the outturn report is prepared on the day the ship leaves the port. On the other hand, it appears that the goods mentioned in the two outturn reports were discharged on March 3, 1957 and if that date is taken as the date when the goods should have been delivered, this suit is barred as it is beyond one year as provided in Clause 6 of Article III, the suit having been "filed on March 15, 1958. The two outturn reports which have been tendered in evidence relate only to part of the goods discharged.

It was admitted by the learned Advocate for the defendant that there were other goods discharged from the ship.

28. As pointed out by the Supreme Court the material point of time for calculating period of one year is the date of departure of the ship from the port. The defendant could have produced evidence to show the actual date of the ship's departure from the Port of Calcutta, but he has not chosen to do so. The onus is on the defendant to prove that the claim is barred by reason of the provisions in Clause 3 of paragraph 6 of Article III of the Schedule to the Act. The defendant has failed to discharge that onus and he has withheld from the Court material evidence which was available to prove the actual date of departure of the ship. In these circumstances I hold that the plaintiff's right to sue was not extinguished by lapse of time.

29. I should note, however, that reference was also made to two other decisions reported in *Ladhubhai Manekchand v. New Dholera Steamship Ltd.*, AIR 1952 Sau 104 and *Haji Shakoor, Firm v. Firm Volkart Brothers*, AIR 1937 Sind. II for the purpose of establishing that the plaintiff's claim to file this suit is extinguished. Having regard to the judgment of the Supreme Court, discussed by me above, it is not necessary for me to deal with these two cases separately.

30. Before proceeding to deal with the next point I should refer to *Scrutton on Charter parties and Bills of Lading*, 6th Ed., page 478, to which reference was made in course of the arguments by the learned Advocate for the plaintiff. Reference to *Scrutton* was made to repel the argument advanced on behalf of the defendant that notice of loss or damage was not given by the plaintiff as required under the first paragraph of Clause 6 of Article III of the Schedule to the Carriage of Goods by Sea Act. All that Clause 6 provides is that unless notice is given as required thereby, removal of the goods shall be prima facie evidence of delivery by the carrier of the goods. To my mind this Clause is of little help to the defendant. The only consequence of omission to serve the notice is that the removal of the goods amounts to prima facie evidence of delivery and nothing more. But this prima facie evidence can be rebutted if it is proved that goods have not been delivered at all. In the instant case, on the evidence tendered, the plaintiff has established that two bales were short-landed and not delivered. That being the position *Scrutton's* comments on Clause 6 are of no help to the defendant.

31. I shall now deal with the second issue, *Viz.*, whether the plaintiff is the owner of the goods in dispute. The onus of proof relating to this issue is on the defendant. The evidence tendered on behalf of the plaintiff is that payment for the goods was made through a bank. This evidence was not seriously challenged by the learned Advocate for the defendant. Further, the defendant tendered no evidence either oral or documentary to dispute the plaintiff's ownership of the goods. In that view of the matter I hold that the plaintiff is the owner of the goods in dispute.

32. The next point to be discussed is, if the defendant is absolved from all liabilities after unloading of the goods. This is a mixed question of law and fact. The Bill of Lading shows that the contract between the parties provided for submitting claims for damages even after unloading of the goods from the ship. The Bill of Lading lays down an elaborate procedure as to how and when the claim for short delivery, short-landing and non-delivery is to be made. The Carriage of Goods by Sea Act and the Schedule thereto also provide for filing of suits by the consignee After the goods are unloaded. I am there fore of the opinion that the defendant was not absolved from its liabilities after unloading of the goods.

33. The next point to be considered is if the consignor declared the value of the goods prior to shipment. The material allegations on this question are in paragraph 9 of the written statement. The onus of proof on this question is entirely on the defendant. No evidence was tendered in proof of the allegation that no such declaration was made and no argument was advanced on this point either. It seems to me, however, that determination of the question, namely, if the consignor declared the value of the goods does not affect or prejudice the plaintiff's claim in this suit. The defendant accepted the goods carried by sea, a bill of lading was issued in which were set out the conditions on which compensation would be paid to the consignee for non-delivery or short-landing. Having carried the goods on the basis of the terms set out in the bill of lading it is not open to the defendant to repudiate the plaintiff's claim to compensation because the value of the goods was not declared.

34. There is one other matter to which I should refer at his stage. In course of the arguments the learned Advocate for the defendant alleged that the plaintiff had received payment of the compensation from the Insurance Company and therefore cannot maintain this action. It was then pointed out to him by me that there was no such pleading in the written statement and thereupon a prayer was made for adjournment of the suit to enable the defendant to make an application for amending the written statement. Such prayee was granted and later on an application for amending the written statement was made. An order for amendment of the written statement was also made. I had assessed the costs of the application for amendment and had made payment of the costs a condition precedent, as in my view the application for amendment was made at a very late stage. The defendant, however, did not comply with the order for payment of costs and therefore-the amendment of the written statement was not effected. This however, did not materially prejudice the defendant's contentions, as at the subsequent hearing of this suit, the learned Advocate for the plaintiff admitted that payment was received by his client from the Insurance Company. The purpose for which the amendment of the written statement was sought, was amply fulfilled by the admission of learned Advocate for the plaintiff. But it seems to me that the defendant should not have applied for amendment of the written statement if the amendment ordered by me was not to be completed. It is obvious that the amendment was not

completed only to avoid payment of the assessed costs.

35. The issues are therefore, answered as follows :

Issue No. 1 ... No. Issue No. 2 ... Yes.

Issue No. 3... No. Issue-No. 4 ... No. Issue No. 5 ... No.

36. The last issue is a general issue as to the relief to which the plaintiff is entitled. For the reasons mentioned above this suit is dismissed. Each party should bear its own costs.