BOMBAY HIGH COURT

Haji Shakoor Gany

Vs

H.E. Hinde and Co. Ltd

(Blackwell, J.)

14.01.1931

JUDGMENT

Blackwell, J.

1. On June 27, 1930, the plaintiffs as the holders for value of bills of lading for 27,398 bags of sugar loaded on a ship owned by defendants No. 1 brought this suit to recover from defendants Nos. 1 and 2 damages in respect of a short delivery of 1078 cwts., 2 quarters and 26 lbs. This short delivery is admitted. The suit was also framed in conversion in respect of certain sweepings. That claim and the issues raised thereon were abandoned at the hearing.

2. The pleadings as originally framed were defective on both sides, and I allowed certain amendments both of the plaint and of the points of defence in order that all the matters in dispute between the parties might be properly determined.

3. The ship arrived on May 4, 1929, and was completely discharged on May 8, 1929. Having regard to Article 31 of the Indian Limitation Act, the suit against defendants No. 1 was prima facie barred,-the suit not having been brought until June 27, 1930. In order to meet this difficulty the plaintiffs pleaded in paragraph 9A of the plaint as amended that defendants No. 1 had at all material times been absent from British India, and that the suit was not barred against them by reason of Section 13 of the Indian Limitation Act. In that paragraph the plaintiffs also stated that they would, if and so far as might be necessary, contend that their claim was not barred by limitation by reason of an acknowledgment of liability contained in defendants No. 2's letter dated January 24,1930. No argument has been submitted to me upon this allegation in that paragraph.

4. It was thereupon contended as regards the alleged liability of defendants No. 1 that the plea raised in paragraph 9A of the plaint would not avail the plaintiffs, inasmuch as the bills of lading incorporated all the terms, provisions and conditions of the English Carriage of Goods by Sea Act, 1924, and that they were thereby discharged from liability in respect of the claim in this suit.

5. The provisions relied upon as regards the alleged liability of defendants No. 1 is Article 3, Clause 6, of the schedule to that Act,-the material part of 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 suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

6. They contend that as the suit was not brought within one year after the delivery of the goods, they are discharged from liability under the terms of the bills of lading which incorporated this provision.

7. In answer to this contention the plaintiffs rely upon Section 28 of the Indian Contract Act, which runs thus :-

> Every agreement), by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

8. The plaintiffs submit that the words relied upon by defendants No. 1 in Clause 6 of Article 3 limit the time within which the plaintiffs may enforce their rights, and that the agreement is to that extent void.

9. In reply to this argument, defendants No. 1 rely upon the decision of the appeal Court in Baroda Spinning & *Weaving Company, Limited v. Satyanarayen Marine & Fire Insurance Company, Limited*[1] and submit that the principle laid down in this decision applies to the facts of the present case, In that case the facts were that the S insurance company granted a policy of insurance against fire to the B company on certain property of the latter, the policy containing a clause to the effect that if a claim were made and rejected and an action or suit were not commenced within three months after such rejection, all benefit under the policy should be forfeited. Damage was caused to the property of the B company thus insured, and a claim was made by that company on the S insurance company which was rejected by the latter. More than three months after such rejection the B company filed a suit against the S insurance company to recover the amount of their claim. In the judgment of Scott, C.J., at p. 352, that learned Judge said as follows:-

The argument of the appellants' counsel was that the forfeiture clause was equivalent to an agreement that no Court should entertain any suit on the policy unless commenced within three months of the rejection of the claim. The steps in his argument were : Section 3 of the Limitation Act indicates that the law of limitation cannot be modified by agreement of parties as it can in

England; that there is no distinction under that Act between rights and remedies and that a conditional agreement to forfeit rights within the period within which the remedy is not barred by the Limitation Law is a void agreement.I cannot accept the proposition that there is no distinction in India between rights and remedies. Section 28 of the Limitation Act shows the cases in which the loss of the remedy will destroy the right but that does not cover suits for money such as we are now concerned with. On the other hand the loss of the right always involves the disappearance of the remedy-a vary material consideration in the case of a conditional forfeiture of all benefit under a policy.

10. In my opinion, the effect of the incorporation of Article 3, Clause 6, into the bills of lading in this case is that the rights of the holders have been extinguished in respect of the claim made in this case. As, therefore, the plaintiffs have no rights to enforce, there is, in my view, no question of the remedy being barred, and Section 28 of the Indian Contract Act does not assist the plaintiffs, I think that the principle laid down in the case to which I have referred applies to the facts of the present case, and that the plaintiffs' claim against defendants No. 1 consequently fails.

11. The plaintiffs, however, contend that in any event they have a good claim against defendants No. 2 by reason of a statutory obligation which they contend that defendants No. 2 have incurred under the Sea Customs Act. The sections relied upon are 64 and 85. Section 64 begins with these words :The Customs-collector may refuse port-clearance to any vessel until.

12. Then follow certain provisions which do not affect this case, the material provisions which it is necessary to refer to being (c) and (d). Clause (c) is as follows :-The ship's agent (if any) delivers to the Customs-collector a declaration in writing to the effect that he will be liable for any penalty imposed under Section 167, No. 17, and furnishes security for the discharge of the same;

13. Clause (d) is as follows:-The ship's agent (if any) delivers to the Customs-collector a declaration in writing to the effect that such agent is answerable for the discharge of all claims for damage or short delivery which may be established by the owner of any goods comprised in the import cargo in respect of such goods.

14. The section then continues in these words:-A ship's agent delivering a declaration under Clause (c) of this section shall be liable to all penalties which might be imposed on the Master under Section 167, No. 17, and a ship's agent delivering a declaration under Clause (d) of this section shall be bound to discharge all claims referred to in such declaration.

15. Section 85 of the Act empowers the Customs-collector upon the terms therein mentioned to permit the master of any vessel to discharge the cargo of such vessel or any portion thereof into

the custody of the ship's agents if willing to receive the same. The material part of Section 85, for the purpose of this case, is as follows :-Any ship's agent so receiving such cargo or portion shall be bound to discharge all claims for damage or short delivery which may be established in respect of the same by the owner thereof, and shall be entitled to recover from such owner his charges for service rendered, but not for commission or the like, where any agent for the landing of such cargo or portion has been previously appointed by the owner and such appointment is unrevoked.

16. It is admitted that defendants No. 2 made declarations to the Customs Authorities, and that they apply to the present case. They have been put in as Exhibits C1, C2 and C3. The material declaration for the present purposes is Ex. C2, dated March 21, 1912, whereby defendants No. 2 declare (inter alia) that they "are answerable for discharge of all claims for damages or short delivery which may be established by the owners of any goods comprised in the import cargo of each such vessels in respect of such goods."

17. The argument on behalf of the plaintiffs is that defendants No. 2 by signing this declaration have incurred a statutory liability independent of the contract contained in the bills of lading, and that under Article 120 of the Indian Limitation Act the suit against defendants No. 2 would not be barred until the expiration of six years from the time when the right to sue accrued. The plaintiffs admit that they must rely upon the bills of lading in order to prove that they are the owners of the goods. They, however, submit that they are not affected by the provision in the bill of lading incorporated by virtue of Article 3, Clause 6, of the English Carriage of Goods by Sea Act. The plaintiffs contend that once they establish that they had a claim for short delivery at the time when defendants No. 2 received the goods from the ship, they are now entitled to enforce that claim against defendants No. 2. They submit that the time for ascertaining whether an enforceable claim exists is the time of delivery.

18. In my opinion this argument of the plaintiffs is unsound. By virtue of Sections 64 and 85 of the Sea Customs Act and the declarations made thereunder, defendants No. 2 are answerable for the discharge of all claims for damages or short delivery which maybe established by the owner of any goods comprised in the import cargo in respect of such goods. It is to be observed that until a claim is established, defendants No. 2 are not answerable. Un-less a claim is admitted, it must be established in a manner recognised by law, that is, by a suit, and that suit might be resisted upon a number of grounds, If the defendants to such a suit were to set up only the defence that the claim could not be established upon the ground that their liability was discharged at the time at which it was sought to establish it, because they were confident that such a defence would succeed, it seems to me impossible to say that they might not have had other valid defences which they might have set up if the claim had sought to be established at an earlier date.

It is plain, in my opinion, that the object of Clause 6 of Article 3 is to prevent the carrier or the ship being harrassed with claims brought more than one year after the delivery of the goods, because the carrier and the ship after such a distance of time might be placed in the very greatest difficulty in obtaining the necessary evidence to rebut such a claim. Various defences might be open to them under the terms of the bills of lading, but in order to establish such defenses, they would of course have to procure the necessary evidence. That, I think, is clearly the object of the provision. Further, it is to be observed that the sections of the Sea Customs Act do not speak of establishing the claim as a claim enforceable at the date of delivery. They speak of establishing the claim. I think that the Court in giving effect to the words of those sections must be satisfied that there is an enforceable claim existing at the date of the suit.

19. In my opinion, in the present case there was no such enforceable claim. It seems to me plain that the legislature could not have intended to confer upon the owner of goods claiming under the bills of lading greater rights against the ship's agent than they would have had against the carrier or the ship. In this connection it may be observed that the penalty referred to in Section 64 (c) as being imposed under Section 167, No. 17, is a penalty imposed upon the master of the vessel, and it is the penalty so imposed upon the master of the ship that the ship's agent by virtue of the declaration binds himself to be liable for. To hold that greater rights were conferred upon the holders of bills of lading by the statutory obligation imposed on the ship's agent than are imposed upon the carrier or the ship by virtue of the bills of lading would, in my opinion, lead to startling results. For instance, if the ship's agent was compelled to discharge a claim established for short delivery, he ought to be entitled to be indamnified by the carrier. Yet, if the plaintiff's are right in their argument, although the claim might not be established against the carrier by reason of the provisions of the bills of lading, it could nevertheless be established against the ship's agent by reason of a statutory liability imposing an obligation upon the agent greater than that incurred by the carrier under the contract. In my opinion, this was not the intention of the legislature. I think that the object of the legislature was to authorise the Customs Authorities to release the ship, provided that there was some person within the jurisdiction who would be answerable for such claims as either the ship would have been answerable for, if she had remained within the jurisdiction, or the carrier would have been answerable for, if he had been within the jurisdiction. I think that no greater rights were intended to be conferred against the ship's agent signing the declaration. It follows, therefore, if I am right in my view, that unless the claim can be established against the carrier or the ship, it cannot be established against the ship's agent who has made the declaration under the Sea Customs Act. As, in my opinion, this claim cannot be established against defendants No. 1, it follows that this suit also fails against defendants No. 2.

20. Accordingly, I dismiss this suit with costs, costs to include the costs of the chamber summons for directions. With regard to the costs of the amendment of the plaint made on January 13, 1931,

inasmuch as no extra costs were, in my opinion, incurred by reason of that amendment, although I had reserved the costs of the amendment, I make no order in reference thereto.

Cases Referred.

1(1913) I.L.R. 38 Bom. 344 : s.c. 15 Bom. L.R. 948