

RAZAK & CO., LTD.
v.
LANKA WALLTILES LTD.

COURT OF APPEAL
EDUSSURIYA, J.,
JAYASINGHE, J.
C.A. NO. 316/88 F
D.C. COLOMBO 82984/M
JULY 22ND, 1998
AUGUST 18TH, 1998

Judicature Act – S. 13 – Admiralty Jurisdiction Act S. 2, 3 – Shipping space allocated in Ship – Cargo accepted for loading – Ship arrested – Shipper ordered to offload – pay costs of offloading – To recover cost – Does District Court have jurisdiction? Admiralty jurisdiction – Privity of Contract – Central Freight Bureau law S. 15, 16 – liability – Is an agent liable in Tort?

The plaintiff respondent had on or about 21. 6. 77 requested the Central Freight Bureau (CFB) for allocation of shipping space. Upon representation by the defendant-appellant to the CFB. Shipping space was provided, and cargo was loaded. The ship could not sail as it was arrested. The plaintiff respondent was called upon to pay for the costs of offloading. The plaintiff instituted action in the District Court to recover the said costs. The defendant took up the position that the right to receive cargo on board has been reserved with the Master of the vessel, and the Master had placed the goods on Board, and the defendant became aware of the arrest of the ship only on 19. 7. 77 and the vessel was in the custody and control of the Marshal of the Admiralty court and that no goods can be placed on board or discharged from the vessel without the express consent of the Marshal, that the Master had with the consent of the Marshal accepted the goods on board, and the Master is also liable for such acceptance.

The defendant further contented that, the plaintiff was aware that the vessel was under arrest, when the goods were being loaded and that on the application of the plaintiff the Admiralty Court permitted the plaintiff to discharge the cargo at the expense of the plaintiff and that the court would thereafter determine the liability in regard to costs. The defendant further took up the position that the jurisdiction is exclusively with the Admiralty Court to determine this liability as to the cost of discharge of the cargo.

The District Court held with the plaintiff.

Held:

1. Admiralty jurisdiction relates to matters arising out of disputes involving seafaring carriers and actions before the Admiralty court are either actions *in rem* or actions *in personam*.

This is primarily an action for damages that the goods loaded on a representation made by the defendant and consequently discharged as the ship could not sail.

Damages arising out of negligence of parties are determinable by the District Court.

2. Under the statute, the shipping agent and the shipper have to seek the CFB and once the CFB brings the two parties together a privity of contract is established and parties may sue each other in tort or in contract.
3. The plaintiff's action is tortious on the basis of fraudulent and/or negligent representation made by the appellant to the CFB.
4. As a general rule agent is himself liable for any wrongful act committed by him in carrying out the principals instructions.

APPEAL from the judgment of the District Court of Colombo.

Case referred to:

1. *Scruttons v. Midland Silicones Ltd.* – 1962 AC 446.

Sanjeewa Jayawardena for defendant-appellant.

S. Sivarasa, PC with *Bimal Rajapakse* for plaintiff-respondent.

Cur. adv. vult.

November 13, 1998.

JAYASINGHE, J.

The plaintiff a manufacturer and exporter of ceramic tiles alleged in the plaint filed in the District Court of Colombo that he requested the Central Freight Bureau on or about 21. 6. 1977 for allocation of shipping space on a vessel calling Doha & Qatar for approximately 340 metric tons of ceramic tiles; that upon the representation made by the defendant to the Central Freight Bureau the plaintiff was duly

informed by the said Central Freight Bureau that shipping space was available on MV "Falak" sailing in July, 1977; that the plaintiff made ready for shipment quantities of its products for shipment to its customers amounting to 333-31 metric tons valued at US \$ 70781.04; that on 15. 07. 1977 the defendants through its agents/servants informed the plaintiff that the said vessel was ready to accept cargo and to make available the cargo for loading; that consequently 333-31 metric tons were accepted for loading between 15th to 28th July, 1977; that at all times material to this action the defendant was aware that the said vessel was incapable of moving on its own steam and/or under arrest pursuant to an order of a competent Court and accordingly could not sail on schedule; that the defendant fraudulently or negligently failed to notify the plaintiff of such incapacity and thereby induced the plaintiff to load the said cargo in the belief that the vessel would sail on schedule; that the plaintiff was compelled to obtain an order from the Admiralty Court in Colombo for the discharge of the cargo from the vessel in order to mitigate damages; that the plaintiff was called upon to pay a sum of Rs. 333,310/- as costs of offloading the cargo; that a cause of action has accrued to the plaintiff for the recovery of the said sum and prayed for judgment in a sum of Rs. 333,310/-.

The defendant filed answer; denied jurisdiction of Court; that the defendant informed the Central Freight Bureau in early July, 1977, that shipping space was available on MV Falak; that such information was communicated to the Central Freight Bureau on information received from the master of the vessel; that Central Freight Bureau booked shipping space in the vessel for 340 metric tons of ceramic tiles; that the right to receive cargo on board the vessel has been reserved with the master of the said vessel; that the master of the vessel did place the plaintiff's goods on board the vessel; that the defendant became aware only on 19. 7. 1977 that the said MV "Falak" was under arrest; that the said vessel was in the custody and control of the Marshal of the Admiralty Court of Colombo; that no goods can be placed on board or discharged from the vessel without the express consent of the said Marshal; that the master of the vessel had evidently with the consent of the said Marshal accepted the said goods on board; that the responsibility for such acceptance is, in the first instance with the Marshal; that the master of the said vessel is also liable for such acceptance because the goods were received by him and receipts issued; that the plaintiff was aware that the vessel was under arrest

when the goods were being loaded; that the plaintiff made an application to the Admiralty Court for an order to permit the plaintiff to discharge the cargo at the expense of the defendant and/or owner of the vessel; that the said Court made order directing the Marshal to arrange the discharging of the cargo at the expense of the plaintiff; that the Court would thereafter determine the liability in regard to such costs; that the jurisdiction is exclusively with the Admiralty Court to determine the liability as to the cost of discharge of the cargo and moved for dismissal of the plaintiff's action.

Mr. Jayawardena submitted that the District Court of Colombo has erred in conferring upon itself the jurisdiction to determine this dispute and that sole and exclusive jurisdiction being vested in the Admiralty Court by virtue of section 13 (1) of the Judicature Act.

The Admiralty Court in the first instance made order that the goods loaded into the ship be discharged at the expense of the plaintiff and reserved for a later date the determination as to who should incur the expenditure for the said discharge. It is on that basis that the defendant stated that the parties have to go back to the Admiralty Court for the determination of the indemnity. Admittedly the goods have been placed on board by the plaintiff on the representations made by the defendant that the ship would sail on schedule. It was in fact the defendant by "P1" that informed the Central Freight Bureau that shipping space was available on MV Falak. It was on this representation that the plaintiff in good faith proceeded to deposit its cargo in the ship. If as a result of the conduct of the defendant the plaintiff had to incur expenditure for the discharge of goods it must necessarily be attributable to that conduct of the defendant. It was on that basis that the plaintiff alleged that a cause of action has accrued to the plaintiff to sue the defendant for the recovery of the said sum.

Admiralty jurisdiction relates to matters arising out of disputes involving seafaring carriers and actions before the Admiralty Court are either in *rem* or actions *in personam*. This is primarily an action for damages; that the goods loaded on a representation made by the defendant and consequently discharged as the ship could not sail on its own steam does not necessarily bring the matter within the jurisdiction of an Admiralty Court. It was necessary to seek the approval of the Admiralty Court for the discharge of the goods for

the reason that it was under arrest on an order made by the Admiralty Court. The Admiralty jurisdiction of the High Court is set out in section 2 of the 3 Admiralty Jurisdiction Act, No. 1983. Section 2 (1) sets out the area in which the Admiralty Court is vested with jurisdiction to hear and determine claims arising out of disputes. The jurisdiction of the Admiralty Court is therefore confined to the parameters of section 2 (1). However the jurisdiction of the Admiralty Court is not exclusive. Section 2 (2) (b) provides that;

Nothing in section 13 of the Judicature Act, No. 2 of 1978 or subsection (1) shall be read and construed as affecting any jurisdiction conferred by any other law, on any other court or tribunal to hear and determine any such question or claim as referred in subsection (1). Therefore it cannot be said that the jurisdiction of the District Court is ousted by the Admiralty jurisdiction of the High Court as submitted by Mr. Jayawardena. It is my view that damages arising out of the negligence of parties are determinable by the District Court. Mr. Jayawardena however did not cite any authority to support his contention that in matters such as this the jurisdiction was with the Admiralty Court. I am unable to accept that the District Court acted without jurisdiction in this instance.

Mr. Jayawardena also submitted that the respondent cannot maintain this action in the absence of privity of contract between the appellant and the respondent. According to section 16 of the Central Freight Bureau law:

- (1) The Minister may, from time to time, by Order published in the *Gazette*, vest in the Bureau, with effect from such date as may be specified in the order, the exclusive right to book, reserve or allocate freight or cargo space on any ocean going vessel for the carriage of goods other than the goods specified in the order, from any port in Sri Lanka to any destination specified in the order.
- (2) On and after the date with effect from which the exclusive right to book or reserve freight or cargo space for the carriage of any goods to any destination has been vested in the Bureau under subsection (1) –

- (a) no person other than the Bureau shall make any booking or reservation of freight or cargo space with a shipowner or his agent for the carriage of such goods to such destination;
- (b) no person shall ship such goods to such destination on any ocean going vessel unless freight or cargo space has been booked, reserved or allocated for the carriage of such goods by the Bureau; and
- (c) any booking, reservation or allocation of freight or cargo space for the carriage of such goods to such destination in contravention of the preceding provisions of this subsection, and any contract of affreightment in respect of such carriage entered into between a shipper and any owner, agent or master of an ocean going vessel shall be deemed for all purposes to be null and void and to have no force or effect whatsoever.

The preamble to Law, No. 26 of 1973 has been enacted to provide for the establishment of the Central Freight Bureau for the purpose of centralization of booking of freight from Sri Lanka to such foreign ports as may be determined by the Minister.

Counsel further submitted that in view of section 16 the respondent is enjoined by law from directly entering into a contract with the appellant. Therefore in such circumstances the respondent cannot maintain the present action against the appellant as parties are not joined by contract resulting in the absence of privity of contract. I am unable to accept the submission. The parties both the shipping agent and the shipper have to seek the Central Freight Bureau by operation of law. This is required by statute. Therefore on that basis there is no privity of contract in the sense envisaged by counsel. However once the Central Freight Bureau brings the two parties together a privity of contract is established and parties may sue each other in tort or in contract.

Mr. Jayawardena seems to have overlooked the fact that it is the basis set out above that operates to attach liability to the appellant on the basis of a Tort. It is ridiculous to assume that a cause of action accrues to the parties to sue the Central Freight Bureau unless

negligence/fraud of the Central Freight Bureau is established. The Central Freight Bureau is cast with no obligation to make a physical verification of any space available on any ship. It only operates as a fund that collects the space available for affreightment to be disbursed among the prospective shippers. The Central Freight Bureau acts on the representation made by the agents of the ship as to the availability of space and the readiness of a vessel to sail for designated destinations. "D2" which Mr. Jayawardena relies upon is a document issued by the Central Freight Bureau to the respondent confirming the freight booking of 340 metric tons of wall tiles to Doha on MV. Falak. This confirmation of the freight booking has been effected by the Central Freight Bureau for "Lanka Wall Tiles" (ie plaintiff) on the representations made by the appellant. According to "D1" the Central Freight Bureau has written to the appellant urging the appellant to inform without delay the likely date MV. Falak would sail as prospective shippers have complained that the delay may cause documents to be dishonoured on Falak's arrival in the Persian gulf. The Central Freight Bureau has also urged the appellant to confirm the ship's proposed itinerary after leaving Colombo. D1 and D2 are evidence that Ms. Razak & Company the appellants have been operating as agents for "MV. Falak" and of an admission that the defendants are the local agents.

Counsel sought to impress upon court that the plaintiff having come to court on the basis of a contractual agreement could not now maintain this action on the basis of a Tort. It would appear from para 9 of the plaint that the plaintiff alleged that the defendant was aware that the vessel was incapable of moving on his own steam and/or under arrest pursuant to an order of a Competent Court and accordingly would not sail on schedule and that the defendant fraudulently or negligently failed to notify the said facts and thereby induced the plaintiff to load the said cargo on the said vessel in the belief that the vessel would sail on schedule and in para 13 the plaintiff alleged that by reason of fraudulent and/or negligent acts of the defendant that the plaintiff has suffered loss or damage in a sum of Rs. 333,310. The plaintiff also raised an issue on that basis. This is evidenced by document of P6. According to "P6" the defendants were aware that the ship had developed engine trouble and was adrift and had to be towed to Colombo for necessary repairs. When the defendant informed the Freight Bureau that shipping space was available on MV. Falak it was still being repaired. There was a duty cast

on the defendant to monitor the progress of the repairs to the point of the ship being load ready. If they did, they would have been aware of the subsequent development and that the ship was arrested on orders of the High Court. On "P6" itself negligence on the defendant is established. Mr. Jayawardena submitted that the alleged failure to notify the prevelant circumstances cannot in any manner be held to have been actuated by an intention to be deceitful or deliberately and maliciously caused the respondent to incur loss and damage. This certainly is not the case of the respondent. Issue No. 3 was on the basis whether the appellant fraudulently or negligently failed to notify the respondent of any one or more of the matters specified in issue No 2. All that the respondent has to establish is that; between 15th July and 20th July, 1977, the appellant was aware of the elements set out in issues 1 and 2 and that there was a failure on the part of the defendant to inform the plaintiff of such circumstances. On "P6" the defendant was aware that the ship was under arrest and it is on that basis that the plaintiff claims that it was done either fraudulently or negligently and that conduct of the defendant resulted in the plaintiff having to unload the said cargo from the vessel and consequently suffer loss and damage in a sum of Rs. 333,310 for discharging the cargo.

His argument is also untenable in that the plaintiff was seeking to convert a contractual action into an action in Tort.

Mr. Jayawardena's other argument was that it is unequivocally clear that the contract was between the Central Freight Bureau and the appellant acting as agents for and on behalf of its principals and relies on section 15 (2) (e) of the Central Freight Bureau Law No. 26 of 1973 and submits that section 15 (2) (e) specifically contemplates the Central Freight Bureau entering into contracts with shipowners and shipping lines for the carriage of goods. He submitted that this contractual capacity is vested in the said Bureau by the legislature in view of the fact that the shipping lines and exporters are prohibited from contracting together. Therefore he submits that the Bureau does not merely place parties together. He submitted that the fact that all the documentation produced were between the appellant and Central Freight Bureau, was indicative of a privity of contract between the appellant and the Central Freight Bureau and therefore it is the Bureau that can maintain an action against the appellant and that the respondent also could have proceeded against the Bureau for the represen-

tation it made regarding the availability of space. Mr. Jayawardena relied on *Scruttons v. Midland Silicomes Ltd.*⁽¹⁾ House of Lords where it was held that it is a fundamental principal that only a person who is a party to a contract can sue upon it and a stranger to a contract cannot with either of the contracting parties take advantage of the contract even where it is clear from the contract that some provision in it was intended to benefit it. Mr. Jayawardena persists in his attempt to classify the arrangement between the plaintiff and the Central Freight Bureau as a contractual agreement between them in order to escape liability. I am unable to accept this contention. Firstly that section 15 (2) (e) of the Central Freight Bureau Law empowers the Bureau to enter into agreements with shipowners and as stated before, shipping lines, etc., but this section cannot be relied upon by the appellant as to urge that there was a contract between the plaintiff and the Central Freight Bureau. Therefore the above case is of no application. I am satisfied that the Plaintiff's action is tortious on the basis of fraudulent and/or negligent representation made by the appellant to the Central Freight Bureau. Counsel also argued that the respondent failed to establish the point of time as to when it claims the appellant should have notified it of the ship's condition. I am unable to accept this contention. The plaintiff is entitled to proceed to load goods into the ships without any further inquiries as to whether the ship is seaworthy. He is entitled to presume that the ship would sail on schedule and the defendant had held out to the plaintiff that the ship was ready to sail through the Central Freight Bureau. According to "P6" the appellant as agent for MV. "Falak" was aware that the ship had been towed to Colombo on 25. 6. 1977 after developing engine trouble on the high seas and was a drift. Mr. Jayawardena also submits that there was no evidence of how much cargo has been loaded by the time ship's condition became known. "P6" again stands in the way.

We are inclined to accept Mr. Rajapakse's submission that the appellant had to be satisfied on its own inquiries that the ship was loadready from 10. 7. 1977 when it addressed "P1" to the Central Freight Bureau. It is on this footing that fraud/negligence is alleged.

Mr. Jayawardena also submitted that in any event the agent is not liable in tort and that in any event it was the principal who is liable in law for the tort committed by his agent. Personal liability of the agent has been considered in *Fridemans Law of Agency* at page 325. "As a general rule an agent who commits a tort will be personally

liable for his wrongs even if it is done with the authority of his principal and for the principals benefit. He cannot plead the authority of his principal by way of defence even though he does not know what he is doing is tortious". In *Bowstead and Reynolds on Agency* "where loss or injury is caused to any third party by a wrongful act or omission of an agent while acting on behalf of his principal the agent is personally liable whether he was acting with the authority of the principal or not, to some extent as if he was acting on his own behalf, unless the authority of the principal justifies the wrong.

Mckerron in *Law of Delict* 7th edition also takes the same view. That a person who commands instigate or authorises another to commit a wrong is responsible for the wrong in the same manner and to the same extent as if he himself has committed it and a person is also responsible for a wrongful act committed by another which he has subsequently ratified or adopted. This being the liability of principal for the wrong committed by the agents". "It need hardly be stated that as a general rule agent is himself liable for any wrongful act committed by him in carrying out the principals instructions". I am again unable to accept Mr. Jayawardena's submissions that an agent is not liable in tort and that it is a principal who is liable for the tort committed by the agents. The entire case in the District Court was fought on the basis of a tort committed by the defendant-appellant. It was never based on contractual liability. Issues were also raised on that basis by the plaintiff-respondent and no issue was raised by the defendant-appellant that there was a contractual liability and the defendant was represented by an eminent counsel. The defendant has been sued on his direct liability for the damages incurred. The plaintiff-could have well sued both the defendant who was directly liable for his negligence and the principal on the basis of his vicarious liability if he so desired. In this instance the plaintiff had chosen to proceed only against the defendant.

For the reasons stated above the appeal is dismissed with costs fixed at Rs. 10250/-.

EDUSSURIYA, J. – I agree.

Appeal dismissed.