P. B. UMBICHY LIMITED
v.
"MV MOSCEINCE" AND JUGOLINIJA RIJEKA YUGOSLAVIA

COURT OF APPEAL
D. P. S. GUNASEKERA, J. (P/CA),
J. A. N. DE SILVA, J.
C. A. APPEAL NO. 97/88
ACTION IN REM NO. 9/85
MAY 13 AND JULY 21, 1997.

Admiralty Law – Arrest of ship – Shortfall in delivery of consignment of Turkish red split lentils – Failure to establish weight – Admission of documents subject to proof – SS. 61 and 62 of Evidence Ordinance.

Held:

In view of the denial in the answer and the calling for strict proof of the quantity of the consignment and also in view of the fact that the documents were admitted subject to proof it is essential and imperative that the plaintiff should have proved the documents. This was further necessary in view of the printed conditions in the Bills of Lading. On the face of the Bills of Lading the words "STW" is typed which means "said to weigh". In addition it is printed on the Bills of Lading "weight, measure, marks, numbers quality, contents and value if mentioned in the Bill of Lading are to be considered unknown unless the contrary has been expressly acknowledged and agreed to. The signing of the Bill of Lading is not to be considered as such an agreement". Therefore plaintiff should have called the makers who participated in the weighing of the consignment.

APPEAL from judgment of the High Court.

K. Kanag Iswaran, PC with *A. I. B. Brito Mutunayagam* for plaintiff-appellant.

Desmond Fernando, PC with *Suresh Phillips* for defendant-respondent.

Cur. adv. vult.

August 29, 1997

GUNASEKERA, J.

The plaintiff-appellant had purchased 1,440 metric tons of Turkish red split lentils from the Middle-East Soil Products Corporation of Beyrouth for US$ 849600 C and F to be shipped from the Port of Iskenderum to the Port of Colombo in 28,800 bags each weighing 50 kilograms.

Payment was by way of an irrevocable Letter of Credit in favour of the seller opened through the Habib Bank, Colombo. In terms of the Letter of Credit the seller had to present –

(*a*) the manually signed invoices certifying that the merchandise was of Turkish origin;

(*b*) Clear shipped on board Bills of Lading;

(*c*) Certificates of weight, quality, packing issued by S. G. S. Geneva or Agents whether individually or combined; and

(*d*) Phythosanitary and fumigation certificates in order to be able to draw the purchase price.

The full consignment of the contracted cargo was shipped on board the motor vessel 'Mosceince' owned by the defendant-respondent and two Clean Bills of Lading numbered ISK 001 dated 4th March, 1985 for 16,400 bags and 1SK 004 dated 5th March, 1985 for 12,400 bags were issued by the Master of the vessel. Before the ship arrived in the Port of Colombo the seller tendered the said two clean Bills of Lading together with the other documents called for under credit, negotiated the said documents and collected the full purchase price of US$ 849,600. The seller could not have been able to collect any

payment under the letter of credit but for the issue of clean Bills of Lading by the carrier namely the owners of the vessel 'MV Moscenice'.

Upon arrival of the ship in Colombo the plaintiff-appellant was informed by the local agents of the vessel that the Mates Receipt issued by the Master of the ship at the time of loading had indicated that approximately 300 to 400 bags were torn, slack, leaking and damaged and therefore they could issue only a claused delivery order.

A survey of the consignment indicated that there were only 26,122 bags intact whilst 2,428 bags were slack and there was a short delivery of 250 bags. Of the 26,122 bags described as being intact there was shortfall of 59,812.38 kilograms in total weight as against the invoiced weight, in respect of the 2,428 slack bags there was a shortfall of 7,866.72 kilograms in weight as against the invoiced weight and the short delivery 250 bags amounted to a shortage in weight of 12,800 kilograms as per invoiced weight.

The plaintiff-appellant instituted action in Rem No. 9/85 in the High Court of the Republic of Sri Lanka and had the aforesaid vessel arrested for the recovery of loss and damage caused to the appellant by reason of –

(*a*) the wrongful and unlawful issue of clean Bill of Lading when in fact the said Bills should have been claused in view of the claused mates receipts issued by the Master of the vessel, and

(*b*) the damage caused during the carriage to the plaintiff-appellant's cargo. The claim under (*a*) being for tortious liability and the claim under (*b*) being for contractual liability.

In the petition of the plaintiff-appellant dated 3rd March, 1986, it was stated that the respondent the owner of the motor vessel 'Moscenice' and or its Master and or their agents and servants had acted wrongfully and unlawfully in issuing or causing to be issued clean Bills of Lading as a result of which the plaintiff-appellant has suffered loss and damage in a sum of US$ 66,509.28.

The parties went to trial and the following admissions were recorded:

(1) Paragraphs 1 and 3 of the petition are admitted.

(2) Bills of Lading A1 and A2 are admitted.

(2*a*) Masters Receipt issued at the time of loading indicated that the contents of 316 bags were leaking.

(3) that the motor vessel 'Moscenice' arrived at the Port of Colombo on 19. 3. 1985.

The following issues were raised on behalf of the parties:

Plaintiff's issues

(1) Did the plaintiff purchase a quantity of 1,440 metric tons of lentils C and F from the Middle East Products Corporation of Beyrouth?

(2) Was the plaintiff at all times material the owner of the said cargo of lentils?

(3) Was the price of the said cargo of lentils US$ 849,600.00?

(4) Was the payment of the price for the said cargo to be made under and in the terms of a Letter of Credit opened by the plaintiff?

(5) Was one of the documents to be tendered under the Letter of Credit a Clean shipped on Board Marine Bill of Lading?

(6) On or about the 4th/5th March, 1985, did the defendant issue the Bills of Lading A1 and A2 as Clean shipped on Board Marine Bill of Lading?

(7) Was payment made under the said Letter of Credit upon presentation of the said Bills of Lading marked A1 and A2?

(8) But for the presentation of the said Clean Bills of Lading marked A1 and A2 could payment have been made under the said Letter of Credit?

(9) Did the Mates Receipt issued at the time of loading indicate that approximately 300 to 400 bags were torn, slack, leaking and damaged?

(10) If so, was the respondent acting wrongfully and unlawfully in issuing or causing to be issued Clean Bills of Lading?

(11) Upon arrival of the vessel at the Port of Colombo, did the survey indicate that:

(*a*) only 26,122 bags were intact?
(*b*) 2,426 bags were slack?
(*c*) 250 bags were short delivered?

(12) Did the survey also indicate that there was a total shortfall in weight of 76,030.10 kilograms as against the invoiced weight?

(13) If Issues I to 12 or any one or more of them are answered in favour of the plaintiff what damages has the plaintiff suffered?

Respondent's Issues

(14) Were the Bills of Lading issued subject to the terms stipulated and the conditions thereof?

(15) If so, can the plaintiff have and maintain this action for damages?

At the trial Eliyathamby Shanmugam the Chairman of the plaintiff Company, D. M. Miskin, an offficer of the Habib Bank, S. Fredrick James, Chief Surveyor attached to Lloyds Ltd., V. N. D. Hector Lawrance, Store-Keeper of the Sri Lanka Ports Authority and Uppakutty Balasubramaniam, Store-Keeper of P. B. Umbitchy Ltd. gave evidence for the plaintiff and W. E. Fransiscus, Chief Superintendent, Ports

Authority, R. M. H. J. Perera, Administrative Officer, Ports Authority tally Section and S. T. Rajanathan, Assistant Commercial Manager of the Sri Lanka Ports Authority gave evidence for the defendant.

After a consideration of the evidence oral and documentary led on behalf of the parties the learned Judge of the High Court exercising admiralty jurisdiction answered issues 2 to 7, 10, 11 (*a*) (*b*) and (*c*) and 12 in the affirmative. In respect of issue 1 which was "Did the plaintiff purchase a quantity of 1,440 metric tons of lentils C and F from the Middle East Soil Products Corporation of Beyrouth the learned trial Judge having answered it in the affirmative came to a finding that there was no evidence to establish the weight of the lentils. Issue 8 was answered in the negative. The learned trial Judge held that the survey did not establish that there was a total shortfall in weight of 76,030.10 kilograms of lentils as against the invoiced weight. Answering issues 13 and 15 the trial Judge held that the plaintiff was entitled to damages in a sum of Rs. 23,238.00 only.

In this appeal the plaintiff-appellant seeks to have that part of the judgment of the learned trial Judge where he has held that the weight of the lentils has not been established by evidence in answer to issues 1 and 12 set aside.

The certificates of weight quality and packing in respect of the 16,400 and 12,400 bags of Turkish red split lentils marked P11 and P12 were admitted in evidence subject to proof through the chairman of the plaintiff's company when giving evidence (vide pgs. 57 and 59 of the proceedings).

It was submitted by learned President's Counsel for the plaintiff-appellant that the learned trial Judge had misdirected himself in law in calling for the strict proof of documents P11 and P12 and in rejecting them on the ground that the makers of the documents and those who participated in the weighing of the consignment were not called.

It was the contention of learned counsel on behalf of the plaintiff-appellant that the documents P11 and P12 were receivable in evidence and was *prima facie* evidence of their contents. We are of the view that his contention would be correct if these documents were admitted. But in the instant case the respondent objected to these documents being admitted and insisted that they be proved.

Section 32 (2) of the Evidence Ordinance makes statements written or verbal made by persons of relevant facts admissible for its states:

> "that such statements are relevant when the statement was made by such persons in the ordinary course of business and in particular when it consists of any entry or memorandum made by him in books in the ordinary course of business or in the discharge of professional duty or of documents used in commerce written or signed by him".

Learned counsel for the appellant submitted that P11 and P12 have been issued from S. G. S. Geneva and are commercially accepted and are acted upon by parties the world over whether it be banks or strangers to a contract between a buyer and a seller as it forms the life blood of international commerce and provides in the absence of any proof of fraud or deceit *prima facie* evidence and proof of what is stated therein and contended that the only conditions of admissibility under this section is either that it is unreasonable to expect the makers to have been called on account of the delay and expenses and it must be a document used in commerce and that both these conditions were satisfied. We are unable to agree with this submission of learned President's Counsel. In our view section 32 (2) deals with only the relevancy of such documents. These documents have been objected to by the defendants and were marked subject to proof and therefore the burden of proving them according to law was on the plaintiff.

Section 61 of the Evidence Ordinance states that the contents of documents may be proved either by primary or by secondary evidence. Primary evidence according to section 62 means the document itself produced for the inspection of the court and when documents P11 and P12 were admitted subject to proof the burden clearly rested on the plaintiff to prove the said documents by calling its maker.

In cross-examination the chairman of the plaintiff company Mr. Shanmugam admitted that he cannot say from his personal knowledge that each bag contained 50 kilograms and went on to say that he was relying on the S. G. S. certificates P11 and P12 but was unable to identify signatures appearing on them.

The learned trial Judge in his judgment observed as follows: The plaintiff among other documents produced in this case produced P11, P11(*a*), P12 and P12(*a*) the certificates of weight, quality and packing dated 4.3.85 and 5.5.85 issued by S. G. S. Geneva. These documents were allowed to be produced subject to proof. These documents were vital and proof of these documents were imperative to establish the plaintiff's claim. The documents P11 and P12 contained the legend "that on instructions received our inspectors proceeded to the following operations at Iskenderum weighing effected under our control with the following result: 16,400 bags Turkish red split lentils 820,000 kilograms gross per nett".

The documents P12 and P12 (*a*) contain the same legend except the quantity to be 12,400 bags of Turkish red split lentils 620,000 gross per nett.

It is my considered view, in view of the denial in the answer and the calling for strict proof of the quantity and weight of the consignment and also in view of the fact that the documents were admitted subject to proof it was essential and imperative that the plaintiff should have proved the documents. This was further necessary in view of the printed conditions in the Bills of Lading A1 and A2, P5 and P6; on the face of the Bills of Lading the words STW is typed which means "said to weigh". In addition to the above words it is printed on the Bills of Lading "weight, measure, marks, numbers, quality, contents and value if mentioned in the Bill of Lading are to be considered unknown unless the contrary has been expressly acknowledged and agreed to. The signing of the Bill of Lading is not to be considered as such an agreement". Since the plaintiff was aware of the existence of A1 and A2 at the time of filing his affidavit to lead warrant for arrest the plaintiff should and it was essential that he should have proved P11 and P12 to establish his claim and should have called the makers who participated in the weighing of the consignment.

We see no reason to interfere with this finding of the learned trial Judge and accordingly we dismiss this appeal. There will be no costs.

J. A. N. DE SILVA, J. – I agree.

Appeal dismissed.