1968 *Present:* **H. N. G. Fernando, C.J., and Samerawickrame, J.**

SRI LANKA SHIPPING COMPANY LTD., Appellant, *and* THE INDIAN BANK LTD., Respondent

S. C. 441/64—D. C. Colombo, 52874/M

Contract of carriage of goods by sea—Mis-delivery of the goods to wrong person—Extent of carrier's liability—Time limitation—Rules 6 and 8 of Article 3 of Hague Rules—Rules 1 and 5 of Article 4 of Hague Rules.

The defendant Company had chartered a ship from the ship's owner for the carriage of goods between ports in Ceylon, India, Burma and the Maldive Islands. Its agent in Tuticorin contracted with the Mercantile Corporation of Tuticorin for the carriage of a shipment of cane jaggery consigned to the Star Line Trades, Colombo, on whom the consignor drew a demand Bill for the value of the jaggery. The Bill was drawn in favour of the plaintiff, the Indian Bank Ltd. of Colombo. This Bill, the Invoice for the shipment, the Bill of Lading and the policy of insurance were transmitted to the plaintiff.

After the consignment was landed from the ship and lodged in the Customs ware-house, the plaintiff became entitled to it by established practice, because the shipping documents were in his possession. Nevertheless, the Customs authorities were compelled, in accordance with practice, to deliver the shipment to Star Line Trades (the original consignee) in consequence of the authorisation by the defendant's agents in Colombo to give delivery to the Star Line Trades.

In the present action, which was instituted about 18 months after the arrival of the ship at the Port of Colombo, the plaintiff claimed judgment for the value of the shipment. The principal defence urged was that Condition 10 in the Bill of Lading issued by the defendant provided that "in all cases the carrier's liability is to cease as soon as the goods are lifted from and leave the ship's deck".

Held, that the plaintiff was entitled to judgment in his favour. There was a fundamental breach of the defendant's contractual obligation to deliver the shipment of jaggery to the plaintiff, which obligation the defendant was unable to perform because its local agents had already authorised delivery to be made to some other person. That being so, there was no need to decide whether or not there was any liability based on delict.

Held further, that the time limitation of one year provided in Rule 6 of Article 3 of the Hague Rules could not apply in a case like the present one, which involved only a mis-delivery, and not actual physical loss, of goods.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, Q.C., with *J. A. L. Cooray*, for the Defendant-Appellant.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, *K. N. Choksy* and *L. Rodrigo*, for the Plaintiff-Respondent.

Cur. adv. vult.

March 1, 1968. H. N. G. FERNANDO, C.J.—

The Defendant in this case, the Sri Lanka Shipping Co. Ltd., had chartered from her owner the vessel " Hansboye " for the carriage of goods between ports in Ceylon, India, Burma and the Maldive Islands. The Defendant by its agent in Tuticorin had contracted with the Mercantile Corporation of Tuticorin for the carriage of a shipment of cane jaggery consigned to the Star Line Trades, Colombo, on whom the consignor had drawn a demand Bill for the value of the jaggery. The Bill was drawn in favour of the Plaintiff, the Indian Bank Ltd. of Colombo. This Bill and the Invoice for the shipment, the Bill of Lading and the policy of insurance were transmitted to the Plaintiff in Colombo. According to the usual practice, the Star Line Trades were specified in the Bill of Lading as the " Party to be Notified ", but the Bill was endorsed to the Indian Bank Ltd. or Order.

The " Hansboye " arrived in Colombo some time prior to 13th October, 1959 and delivery of the cargo was taken ex ship by the Ceylon Port Cargo Corporation. The freight list of the Defendant Company and customs documents establish that the shipment of jaggery to which this action relates was landed from the ship and lodged in the Customs ware-house. At this stage, the shipping documents were in the possession of the Plaintiff Bank, and the Plaintiff therefore entitled to the shipment of jaggery. Nevertheless, the Customs authorities delivered the shipment in three parts, on 14th, 15th and 24th October to Star Line Trades (the original consignee) in circumstances which have been stated by the learned District Judge in his judgment.

The judgment refers to the practice of the Port of Colombo, which is that the Port Cargo Corporation has sole authority to take delivery from ships of incoming cargo, that goods thus taken and unladen are landed ashore and lodged in Customs ware-houses, and that goods are released from the ware-houses after payment of Customs and ware-house dues. The practice as to release is that the holder of the bill of lading presents it to ship's Agents in Colombo, who then authorise the Customs to release the corresponding consignment of goods. This authority takes one of two forms : either an endorsement on the Customs bill of entry, or a separate document called a disposal order. The Customs make no inquiry as to the right to possession of a consignment of goods, and release the goods upon faith of the Ship's Agents' authorisation.

The learned Judge reached the following findings of fact : that a disposal order (P39) bearing the seal of Messrs Freudenberg and Co. Ltd. and the signature of one Abeynaike and dated 13th October 1959 was presented to the Customs, and that the consignment of jaggery was then released to Star Line Trades who were authorised by the disposal order to take delivery ; that Messrs Freudenberg and Co. were the local agents of the Defendant Co. and that Abeynaike, who was then employed by Freudenberg and Co., was an employee with authority to act for the latter Co. ;

that the shipping documents were not presented to Freudenberg and Co., and that accordingly the disposal order was issued in breach of the established practice. Upon consideration of the relevant evidence, I concur entirely with the findings of fact which are recited above. It seems to me clear beyond doubt that Abeynaike did have custody of the seal of Freudenberg and Co. and did sign the disposal order at the office of the Company in the ordinary course of business.

On the facts as just stated, the learned Judge held *inter alia* that the Defendant Co., acting through its agents or servants, wrongfully or negligently gave delivery of the shipment to a person other than the plaintiff, or alternatively, wrongfully enabled a person other than the Plaintiff to obtain delivery or possession of the shipment. Judgment was entered in favour of the Plaintiff for the value of the shipment, and this appeal was taken against that judgment.

In the District Court, and before us, several defences were taken to the Plaintiff's claim. The principal defence urged before us was that Condition 10 of the Conditions in the Bill of Lading provided that " in all cases the carrier's liability is to cease as soon as the goods are lifted from and leave the ship's deck ". Relying on this clause, it was argued that the liability of the Defendant Co. to deliver the shipment of jaggery was performed when the shipment was discharged from the ship into the custody of the Port Cargo Corporation, and that thereupon the Defendant ceased to be subject to any further contractual obligation. Even if the Defendant Co. did thereafter, by the issue of the disposal order, enable some person other than the Plaintiff to obtain possession of the shipment, the liability (if any) of the Defendant for so doing arises not under the contract, but as for a delict. That liability arises in English Law under the doctrine of conversion, but, it was argued, that doctrine is not recognized by the Roman Dutch Law (*Daniel Silva v. Johanis Appuhamy* [1]). That case was decided in June 1965, which was quite long after the District Judge gave judgment in the present action, and the judgment clearly appears to hold the Defendant liable as for a wrongful conversion.

In the District Court, however, reference does not appear to have been made to two decisions of the Privy Council, which have an important bearing on the construction of an exception clause in a bill of lading. In *Chartered Bank v. British India Steam Navigation Co.*[2], a shipment of goods had, according to the custom of the port of Penang, been delivered to landing agents appointed by the Shipping Company ; but through a fraud in which the landing agents participated, the goods were delivered to a person other than the holder of the bill of lading. It was held that

[1] *(1965) 67 N. L. R. 457.*

[2] *(1909) A. C. 369.*

the exception clause providing for cessation of the liability of the carrier " when the goods are free of the ship's tackle " operated to protect the Shipping Company from liability. At first sight this decision appears to be much in favour of the Defendant in the present case.

The case just cited was however distinguished from the facts of a more recent case also decided in the Privy Council (*Sze Hai Tong Bank v. Rambler Cycle Co. Ltd.*[1]). In this case, goods had been discharged from a ship at Singapore and placed in a ware-house of the Singapore Harbour Board. Thereafter the Shipping Company's agents authorised the Harbour Board to deliver the goods to a person specified by the agents, and the goods were so delivered. The agents gave this authority without requiring production of the bill of lading, and with full knowledge that the person specified in the authority did not hold the bill of lading. The action of the agents was apparently in accordance with a practice that goods were thus released upon the agents receiving a bank indemnity against loss arising from the release. It was held that here the action of the agents at Singapore can properly be treated as the action of the Shipping Co. ; whereas in the earlier *Chartered Bank* case, the fraudulent act of the landing agent could in no wise be attributed to the Shipping Co. This distinction I hold applicable in the instant case, because the Defendant here has failed to establish that Abeynaike acted fraudulently or issued the disposal order otherwise than in the ordinary course of business of Freudenberg and Co. (My reasons for this observation will be stated presently.) While I readily accept the distinction thus drawn, I think a distinction also arises on somewhat different grounds. In the *Chartered Bank* case, it was not necessary to decide whether or not a Shipping Company is liable for non-fraudulent acts of a landing agent. If, according to the custom of the port, goods have of necessity to be delivered into the custody of a landing agent, who by the same custom has thereafter a duty to give an order of release in favour of the holder of the bill of lading, the position might well be that it is on the landing agent, and not on the Shipping Co., that the true owner relies for due release of the goods. It is no part of the duty of a carrier by sea to land goods ashore, and if he is compelled by custom to engage a " landing agent " to receive and land the goods, it does not necessarily follow that the " landing agent " thereafter acts on behalf of the carrier. It seems at least equally reasonable to regard the landing agent as a person acting on behalf of the true owner. In the instant case, Freudenberg and Co., the ship's agent, had no action to perform on its own account. Its only function, according to the custom of the port, was to inspect the bill of lading on presentation, and then to issue the disposal order ; and this it did solely for the reason that it was the agent of the Defendant Company.

[1] *(1959) A. C. 576.*

Let me cite now from the judgment of Lord Denning in the recent case :—

> " It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was " unto order or his or their assigns ", that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected. "

> " For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, " unto order or his or their assigns ", against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract."

In the final paragraph of his judgment, Lord Denning refers to the possibility that a Shipping Company might be excused for a failure of delivery on the ground of the negligence or inadvertence of a servant or agent ; let me assume also that fraud on the part of a servant or agent might be a ground of excuse. In the present case, however, there was no evidence to establish negligence or inadvertence or fraud on the part of Abeynaike, who issued the disposal order. The position taken up in the Defendant's answer was that no delivery orders relating to these goods were issued by it, and the Defendant's manager in his evidence denied both the possibility that Abeynaike could have signed the disposal order in this case and the authenticity of the seal which the disposal order bears. The learned trial Judge had ample grounds for preferring the version of the Plaintiff's witness that on this occasion, as on others as well, Abeynaike did sign the disposal order presented by the witness and affix the seal of Freudenberg and Co. openly and in the ordinary course of business. If it was the Defendant's case that Abeynaike had acted negligently or inadvertently or fraudulently, there should have been both an issue on the point and some evidence to support it.

For the reasons I have stated, I would hold that there was a fundamental breach of the Defendant's contractual obligation to deliver the shipment of jaggery to the Plaintiff, which obligation the Defendant was unable to perform because its local agents had already authorised

delivery to be made to some other person. That being so, the question whether any liability based on delict arose in this case does not need to be decided.

The Defendant relied also on the fact that this action was filed only in May 1961, about 18 months after the arrival of the ship at the Port of Colombo. This objection was based on the following provision :—Article 3, Rule 6, of the Hague Rules :—

> " 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."

In commenting on the words " loss or damage " in the Hague Rules, Carver (" Carriage of Goods by Sea " 10th Ed., page 162) states that the meaning of these words is ambiguous, and may even refer to loss or damage *to a party* to a contract. If the words do have this wide meaning, then the present action must fail on account of delay in its institution.

I note, however, that the words " loss or damage " occur for the first time in the first paragraph of Rule 6 of Article 3, in a context which refers only to goods actually delivered to the person entitled to delivery thereof. That being so, the same words as they occur in the third paragraph of Rule 6 prima facie have the same limited meaning. The opinion is however expressed in Carver that they have a wider meaning, because the wider meaning was adopted in the case of *Renton v. Palmyra Trading Corporation* [1]. That case however involved the construction, not of Rule 6, but of Rule 8. Rule 8 provides as follows :—

> " Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect."

There seems to be in this Rule a deliberate addition of words for the purpose of including not merely a loss or damage TO goods, but also to loss or damage IN CONNECTION WITH goods. Emphasis is laid, in the judgments of Lord Kilmuir and Lord Morton, on the use of these words in Rule 8.

From the fact that Rule 8 has been held to apply in a case of loss or damage to a party arising from a discharge at the wrong port, it does not therefore follow that the provisions of Rule 6 would equally apply

[1] *(1957) A. C. 149.*

in the case of such an incorrect discharge. So to hold would be to ignore the absence in Rule 6 of reference to loss or damage " in connection with goods ".

I should notice here that—

(*a*) Rule 5 of Article 4 uses the same additional words " or in connection with ", which are used in Rule 8 of Article 3, but are not used in Rule 6 of the latter Article ;

(*b*) in Rule 1 of Article 4 the words " loss or damage " cannot reasonably cover anything but physical loss or damage, for this Rule refers only to loss or damage arising or resulting from unseaworthiness.

Even if, in view of the decision in *Renton's case*, the discharge of goods at a wrong port is a ' loss ' to which the provisions of Rule 6 of Article 3 are applicable, it does not in my opinion follow that the Rule will apply in the circumstances of the present case. There is in fact no provision in the Hague Rules or in a bill of lading which contemplates the variation in the nature of the fundamental obligation of a carrier which results from the custom of the port such as was recognized in the *Rambler Cycle Co.* case, namely, that the issue of authority by a ship's agent for the disposal of goods after their discharge from a ship is involved in the carrier's duty to deliver the goods " to order ". While the Hague Rules therefore are applicable to a case of the wrongful discharge from a ship, one would not expect those Rules to contemplate, and to be applicable in a situation in which some act has to be done by the carrier in pursuance of his contractual obligation at a stage after goods have been duly discharged at the port of destination. In other words, the true position may be that the Rules do not apply in relation to any transaction performed or to be performed after the completion of a carriage by a due discharge. On these grounds also, *Renton's case* is probably distinguishable.

For these reasons, I would hold that the time limitation provided in Rule 6 of Article 3 does not apply in a case like the present one, which involved only a mis-delivery, and not actual physical loss of goods.

Another defence which the Defendant raised was formulated in Issue No. 16 framed at the trial :—

> " Did the bill of lading take effect as a contract only between the owner of the ship (? and the shipper) and not with the defendant as his agent ? "

This defence was based on the last clause in the bill of lading which is in the following terms :—

> " If the ship is not owned or chartered by demise to the company or Line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading

shall take effect only as a contract by the owner or demise Charterer as the case may be as principal made through the Agency of the said company or Line who act as agents only and shall be under no personal liability whatsoever in respect thereof."

In the present case, the Bill of Lading *appears* to be a document issued by the Defendant Co.; there is, at the head of the document, the name of the company and the names of agents of the Company at different Ports. At the foot of the Bill, before the space for the signature thereof, are the following words in print :—

" In witness whereof the Master, or the duly authorised agent of the said vessel hath affirmed to one bill of lading.... "

Then, immediately above the space for the signature, is a line in print which includes the words " For Master " and " Carriers " with something in between which is indecipherable, because over this line there has been imposed in thick type the words " Volkart Brothers Agency ", i.e., the name of the Defendant's agent in Tuticorin. Here the intention *appears* to be to give prominence to the name of the agent. It was admitted in evidence that the signature on the Bill is not that of the Master, but that of an Agent of Volkart Brothers Agency.

Statements in Carver (Chapter 6) refer to cases in which bills of lading are given by a ship-owner to a charterer, and other cases in which a Master signs bills of lading when so required by the charterer. In such cases the contract of carriage is ordinarily with the owner. The present case is of neither such description. What we have here is a bill of lading appearing to be issued by the Defendant, and signed, not by the Master, but by the Defendant's agent at Tuticorin. Hence I entirely agree with the learned District Judge that the situation is covered by the following statement in Carver (at p. 286) :—

" When the charterer does not ship the cargo himself, but procures a cargo to satisfy the charterparty from other merchants, questions arise as to who is responsible to those shippers for the performance of the contracts of carriage made with them, and who may enforce those contracts against them.

The question is really one of fact depending on the documents and circumstances of each case. If the charterer has himself, or by his agents, agreed with the shippers on his own behalf, he is answerable for the carriage of the goods accordingly. So with the shipowner, if he made them. But uncertainty arises when the contract has been made with the master, for he may possibly be regarded as agent either for owner or charterer."

The uncertainty mentioned in the last paragraph of this statement does not arise in the present case, which is not one where the Master has signed the bill of lading. I therefore agree with the answer in the

negative which the learned Judge has given to issue No. 16, and hold that the Defendant cannot rely on the last clause in the conditions of the Bill to disclaim liability for the mis-delivery in this case.

For these reasons, I would affirm the judgment and decree, and dismiss this appeal with costs.

SAMERAWICKRAME, J.—I agree.

Appeal dismissed.