1959 *Present :* **Weerasooriya, J., and K. D. de Silva, J.**

BRITISH INDIA STEAM NAVIGATION CO., LTD., Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 678—D. C. Colombo, 36,065/M

Contract—Carriage of goods by ships—Demurrage—Computation of lay time and demurrage time—Civil Law Ordinance (Cap. 66), s. 2—Carriage of Goods by Sea Ordinance (Cap. 71)—Pilots Ordinance (Cap. 264)—Ceylon Quarantine Regulations, Chapter II, Regulation 6 (1).

In a claim for demurrage against the Government of Ceylon in respect of a cargo of rice conveyed from Rangoon to Colombo in the s.s. " Padana " owned by the plaintiff-appellant—

Held : Under section 2 of the Civil Law Ordinance questions relating to carriage of goods by ships and demurrage are governed by English law.

Although, in a port charterparty, the number of lay days for the discharge of cargo is usually computed from the time the ship is within the port, i.e., within the " commercial area " of the port, it is not unusual for express provision to be made that the days for discharging the cargo should begin at some arbitrarily selected anterior point of time. Accordingly, express provision may be made in a charterparty that the lay time should commence to run from the point of time when notice of readiness to discharge cargo is given while the ship is still outside the commercial area of the port of Colombo. In such a case, if the parties know that pratique is not granted under Regulation 6 (i) of Chapter II of the Ceylon Quarantine Regulations until a ship has entered the area within the breakwater and, nevertheless, expressly provide that if the ship arrives and anchors off the port lay time should commence on her doing so, they in effect provide that lay time should commence notwithstanding that pratique has not been granted and the cargo cannot be discharged.

The general rule is that lay time and demurrage run continuously in the absence of express agreement. When once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause in the contract is clearly worded so as to have that effect.

APPEAL from a judgment of the District Court, Colombo.

Walter Jayawardene, with *Neville Wijeratne*, *Nimal Senanayake* and *D. Fernando*, for the plaintiff-appellant.

V. Tennekoon, Senior Crown Counsel, with *C. H. M. P. Fernando*, Crown Counsel, for the defendant-respondent.

Cur. adv. vult.

July 14, 1959. WEERASOORIYA, J.—

This action relates to a claim for demurrage against the Government of Ceylon in respect of a cargo of rice conveyed from Rangoon to Colombo in the s.s. " Padana " owned by the plaintiff-appellant the carriage of which is governed by the agreement marked " A ".

The s.s. " Padana " arrived in Colombo and anchored outside the port on the 26th August, 1953, at 7.50 a.m. and notice of readiness to discharge was given on the same day at 8.30 a.m. On the 27th August, 1953, she

2—J. N. B 3698-1,593 (8/59).

anchored inside the port at 5.31 p.m. and was granted pratique at 6.10 p.m. The discharge of the cargo, approximately 5,114 tons, was completed at 1.15 a.m. on the 8th September, 1953. The stipulated time for discharge, calculated at an average rate of 800 tons per day in terms of clause 4 (1) of the agreement, was 6 days, 9 hours and 26 minutes, and beyond this time demurrage became payable at the rate of Rs. 3,000 per day, and pro-rata for any part of a day, the vessel was detained for the purpose of unloading.

The substantial point in issue is when the lay time of 6 days, 9 hours and 26 minutes commenced to run. The plaintiff contends that it commenced at 8.30 a.m. on the 26th August, 1953, when notice of readiness to discharge was given while the ship was still outside the port. If the plaintiff's contention is correct a sum of Rs. 14,460/41 would have become payable as demurrage. Giving credit in a sum of Rs. 12,075 paid on that account by the Government of Ceylon, the plaintiff seeks to recover in this action filed against the Attorney-General the balance sum of Rs. 2,385/41.

The defence is that lay time commenced to run from 6.10 p.m. on the 27th August, 1953, (when pratique was granted after the ship had come into port) and the demurrage payable on that basis is only Rs. 10,743/75 ; that the sum of Rs. 12,075 had been paid as demurrage under a mistake of fact in the belief that pratique was granted at 6.10 a.m. on the 27th August, 1953 ; and in the premises the Attorney-General prayed for a dismissal of the plaintiff's action and counter-claimed a sum of Rs. 1,331/25 being the amount paid in excess. At the trial, in addition to the issues based on the pleadings, an issue was framed whether in terms of the agreement " A " the time for discharge of cargo for assessing demurrage commenced from 5.31 p.m. on the 27th August, 1953 (i.e., when the ship anchored in the port). It was agreed that if this issue is answered in the affirmative the plaintiff's action would fail and also that the defendant would not be entitled to judgment in any sum in reconvention.

After trial the Additional District Judge of Colombo dismissed the plaintiff's action and gave judgment for the defendant in the sum claimed in reconvention. From this judgment the plaintiff has appealed.

Under section 2 of the Civil Law Ordinance (Cap. 66) questions relating (*inter alia*) to carriage of goods by ships and demurrage are governed by English law. Although the Carriage of Goods by Sea Ordinance (Cap. 71) contains certain provisions relating to the carriage of goods by sea none of them would appear to apply to the matters in dispute in the present case.

The agreement " A " is in the nature of a charterparty entered into between various ship-owning companies (including the plaintiff) and collectively referred to as the " Conference Lines ", on the one part, and the Government of Ceylon, on the other part. The material portion of clause 4 (1) of the agreement reads—

" Provided, however, if on arrival of a cargo of rice loaded in Burma at the port of Colombo or Galle such cargo has not been discharged at an average rate of 800 tons per day or over, with not less than 4 hatches

available, otherwise pro-rata reduction, the Government shall pay demurrage to the Conference Lines at the rate of Rupees Three Thousand (Rs. 3,000) per day and pro-rata for any part of a day the vessel is detained for unloading beyond the permissible time . . . . ."

Clause 4 (II) provides as follows—

"The time taken for discharge for the purpose of assessing the demurrage payable as outlined in Clause 4 (1) above to commence from the time the vessel arrives and anchors off or in the port of discharge and to continue until completion of discharge, non-weather working days and detention due to mechanical defects of the vessel's gear to be excluded but Sundays and holidays included."

Clause 8 provides that—

"The Act of God, perils of the sea, strikes, lock-outs, accidents, Government prohibitions or requisitioning, all future wars or hostilities and other causes beyond the control of the Government or the Conference Lines are mutually excepted throughout."

It may be stated that clause 4 (1) specially provides that the transport and carriage of each separate cargo of rice shall be governed by the terms and conditions of the bill of lading relating to that cargo and required to be issued by the ship-owner. The particular bill of lading relating to the cargo brought in the s.s. "Padana" is, however, not in evidence, and the trial has proceeded on the basis that the terms governing the carriage of the cargo are those contained in the agreement.

The evidence of Mr. de Silva, who was the Traffic Manager of the Colombo Port Commission during the relevant time, is that no ocean-going vessel is permitted to enter the Colombo harbour without a pilot, that a ship would wait for a pilot at a distance varying from 400 yards up to a mile or two from the breakwater, that on entering the harbour she is allocated a berth by the Master Attendant through the pilot and that in 1953 vessels so berthed discharged their cargo into lighters which were brought alongside them. He stated that due to congestion a ship may have to anchor outside the harbour till such time when she could be brought inside, but it also happened sometimes that a ship delayed coming in for reasons of her own.

It would appear that the limits of the port of Colombo as defined by proclamation issued under the Pilots Ordinance (Cap. 264) extend outside the breakwater and up to a distance of three miles. But according to Mr. de Silva all loading and unloading of cargo take place within that area of the port which is bounded by the breakwater on the seaward side and by the perimeter wall of the Customs on the land side, and is commonly known in shipping circles as the "commercial area" of the port.

It is to be noted that in clause 4 (1) of the agreement "A" the point of destination of the cargo is given as "at the port of Colombo or Galle". The law applicable as regards the commencement of lay days in a port charterparty is stated thus in *Carver on Carriage of Goods by Sea*[1]: . . .

[1] *(9th edition) 916.*

" where the contract provides that the ship is to load or discharge at a port the lay days commence as soon as the ship is within the port, i.e., within the port in a commercial sense, and placed at the charterer's disposal in a state of readiness, so far as the ship is concerned, for loading or discharging ". This statement of the law is based on the leading case of *Leonis Steamship Company, Ltd. v. Joseph Rank, Ltd.*[1]. To quote from the judgment of Kennedy, L. J., in that case: " Just as a port may have one set of limits, if viewed geographically, and another for fiscal or pilotage purposes, so when it is named in a commercial document, and for commercial purposes, the term is to be construed in a commercial sense in relation to the objects of the particular transaction . . . If, then, we find a charterparty naming a ' port ' simply, and without further particularity or qualification, as the destination for the purpose of loading or unloading, we must construe it in regard to the ' arrival ' of the ship at that destination as meaning that port in its commercial sense, that is to say, as it would be understood by persons engaged in shipping business and in regard to the arrival of a ship there for the purposes of the charterparty. In the case of a small port, ' port ' may or may not mean the whole of the geographical port. In the case of a widely extended area, such as London, Liverpool or Hull, it certainly signifies some area which is less than the geographical port, and which may, I think not unfitly be called commercial area ".

It is clear, therefore, that if clause 4 (1) of the agreement stood without any qualification the lay days would have commenced to run only after the s. s. " Padana " had arrived within the area referred to in the evidence of Mr. de Silva as the commercial area of the port of Colombo and was there placed at the charterer's disposal in a state of readiness, as far as the ship was concerned, for discharging her cargo. But it is not unusual for express provision to be made in a charterparty that the lay days for loading or discharging should begin at some arbitrarily selected anterior point of time. For example, in *Horsley Line v. Roechling*[2] (a Scottish case the report of which is not available to me) the lay days were held to have commenced before the ship arrived within the commercial limits of the port. According to the note of that case in *Carver on Carriage of Goods by Sea*[3] although the charterparty required the cargo to be delivered at the port of Savona it also specially provided that time for discharging was to commence on the ship being reported at the custom-house. She arrived in Savona Roads, which were outside the commercial limits of the port, and in accordance with the practice of the port was at once reported at the custom-house. But owing to the crowded state of the port some delay ensued before the ship could enter the port and still more delay before she was berthed where she could discharge. It was held that the charterparty provided in clear and unambiguous terms for commencement of the lay days as soon as the ship was reported at the custom-house.

In *North River Freighters, Ltd. v. H. E. President of India*[4] the charterparty provided for the ship to proceed to one safe berth at the port of Dairen in Manchuria and there load a full and complete cargo. While

[1] *(1908) 1 K. B. 499.*
[2] *(1908) S.C. 866.*
[3] *(9th edition) 922.*
[4] *(1956) 2 W.L.R. 117.*

the charterparty contained the usual provisions for lay days to commence 24 hours after notice of readiness to load had been given by the master, it also contained a separate clause (No. 5) stating that time lost in waiting for berth was to count as loading time. The ship arrived at Dairen in the early morning of the 3rd June, 1951, and came to anchor in the quarantine anchorage, within the commercial limits of the port, where she was boarded by customs and port officials, who sealed up her radio, took away a number of the ship's documents and banned all communication with the shore. No notice was received by the ship from the charterer's agents (who knew of her arrival) as to the loading berth, and the master was unable to give notice of readiness to load to the charterer's agents until the 11th June. The ship berthed on the 16th June. This being a berth charterparty, lay time would normally not have begun to run (in the absence of express provision to the contrary) before the ship had actually berthed. The ship-owners, however, claimed to be entitled under clause 5 to demurrage on the basis that lay time commenced from the 3rd June, and the Court of Appeal in England held that the provisions of that clause put the risk of time wasted in waiting for a berth upon the charterer and such time (from the 3rd June) counted as lay time.

In the present case, notwithstanding that clause 4 (1) of the agreement gives the destination of the cargo as "at the port of Colombo or Galle" the plaintiff relies on clause 4 (II) which specially provides that the time taken for discharge for the purpose of assessing the demurrage payable is to commence from the time the vessel arrives and anchors "*off or in*" the port of discharge. The case for the plaintiff therefore turns on the meaning to be given to the expression "off or in".

The learned trial Judge was of the view that the provision in clause 4 (II) for lay time to commence when the vessel anchored off the port of discharge had been made because the parties contemplated that as a result of congestion in the port of Colombo (which is one of the two ports of discharge specified in clause 4 (1)) the ship for no fault of her own may be compelled to anchor off the port until a berth is available within. He held that lay days are calculable from the time the vessel anchored off the port of Colombo until the cargo was completely discharged. From this finding I see no reason to differ. I think that the expression "off . . the port of discharge" in clause 4 (II) covers the position of the s.s. "Padana" when it lay at anchor outside the breakwater of the Colombo harbour at 8.30 a.m. on the 26th August, 1953, the "port of discharge" in that context being equated to the commercial area of the port of Colombo as referred to in the evidence of Mr. de Silva.

Learned Crown Counsel submitted that there is no evidence that the ship anchored off the port because of congestion within the port or other similar cause and that in the absence of such evidence the possibility remained that the ship so anchored for reasons of her own. This matter was, however, raised for the first time at the hearing of the appeal. If the point was disputed at the trial I fail to understand why an appropriate issue was not framed. Although, therefore, there is no evidence (other

than certain hearsay evidence given by Mr. Matheson, a witness called by the plaintiff) as to why the ship anchored off the port of Colombo I do not think that we should entertain the objection in appeal.

The further question that arises is whether clause 4 (II) is itself subject to limitations or exceptions contained in any other provisions of the agreement. For the Crown it is contended that clause 4 (II) is subject to the exceptions contained in clause 8. The argument based on clause 8 proceeds on the following lines: The s.s. "Padana" was granted pratique only at 6.10 p.m. on the 27th August, 1953, and the period between anchoring off the port of Colombo and the granting of pratique should be excluded from the computation of lay time because under Regulation 6 (1) of Chapter II of the Ceylon Quarantine Regulations (Volume III, Subsidiary Legislation of Ceylon, page 74) the cargo could not have been lawfully discharged until the ship was admitted to pratique; and the operation of this regulation is a Government prohibition or a cause beyond the control of the Government within the meaning of the exceptions in clause 8.

Clause 4 (II) provides not only for the commencement of lay time but also that lay time as well as demurrage time, once commencing, shall run continuously until completion of discharge, subject to the exceptions mentioned in the clause itself (non-weather working days and detention due to mechanical defects of the vessel's gear). The general rule is that lay time and demurrage time run continuously in the absence of express agreement. According to *Scrutton on Charterparties* [1], when once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded so as to have that effect. The same view is expressed in *Carver on Carriage of Goods by Sea* [2].

It appears to me, therefore, that clause 4 (II) was intended by the parties to serve as a special provision for the commencement of lay time and demurrage time and for such time running without interruption subject only to the exceptions specially mentioned in that clause; and that the excepted perils and other exceptions in clause 8 do not apply to clause 4 (II). But even if I should be wrong in taking this view, I do not think that the expression "Government prohibitions" or "other causes beyond the control of the Government" in clause 8 can, in the circumstances of the present case, be construed as including the operation of Regulation 6 (1) in Chapter II of the Ceylon Quarantine Regulations prohibiting the discharge of cargo from a ship prior to pratique being granted.

It would appear from the documents P15 and D2 that in the port of Colombo pratique is not granted until a ship has entered the harbour, by which I understand the area within the breakwater. I think it is reasonable to infer that this fact and also the terms of Regulation 6 (1) were known to the parties at the time they entered into the agreement, although there is no direct testimony to that effect from any witness. When the parties, having such knowledge, expressly provided in clause 4 (II) that if the ship arrives and anchors off the port lay time should

[1] *(15th edition) 343.* [2] *(9th edition) 876.*

commence on her doing so, they in effect provided that lay time should commence notwithstanding that pratique has not been granted and the cargo cannot be discharged. To take a contrary view would, in my opinion, reduce to a complete nullity the provisions in clause 4 (II) relating to the commencement of lay time on the ship arriving and anchoring off the port.

In *Steamship "Induna" Co., Ltd. v. British Phosphate Commissioners, The Loch Dee* [1] the charterparty provided for the cargo to be discharged at the rate of 1,500 tons a working day of twenty-four consecutive hours, but lay days were not to count and demurrage was not to accrue during the period of any delay or hindrance in discharging cargo from, *inter alia*, any cause whatsoever beyond the control of the charterers. The 1,500 tons a day could not, however, be discharged without working night and day. Under an order which was in operation at the port of discharge at the time the charterparty was entered into, but unknown to both charterers and ship-owners, it was illegal to discharge cargo between 9 p.m. and 8 a.m. and in consequence delay was caused in discharging The ship-owners' claim for demurrage was resisted by the charterers on the ground that the order prohibiting the discharge of cargo between 9 p.m. and 8 a.m. came within the exception "any cause whatsoever beyond the control of the charterers". In upholding the contention of the charterers Sellers, J., stated: "If both parties or one of the parties knew at the time of making the contract of existing circumstances which would or might occasion delay, other considerations would arise, but when neither party knew, as here, I see no reason why effect should not be given to that which they have made clear by their contract. If parties are contracting on the basis of a state of affairs known to them, or which it can be shown they were prepared to accept, then an exception relating to something outside their control would, no doubt, be construed to relate to some circumstances or event not so known or something exceptional or abnormal in comparison with the contemplated state of affairs. . . . In this contract there are exceptions dealing with delay by reason of ice, epidemics, labour or political disturbances. Any one of these might in given circumstances be proved to have existed at the time the contract was made, but, if the circumstances were unknown to the parties, it seems to me that they could be relied on if they existed and caused delay when the vessel arrived for loading or discharge".

In *Ciampa v. British India Steam Navigation Co., Ltd.*, [2] the exception relied on by the ship-owners was "restraint of princess", and the circumstances claimed by them as bringing the case within that exception existed at the time of the contract and were known to them. Rowlatt, J., stated: "When facts exist which show conclusively that the ship was inevitably doomed before the commencement of the voyage to become subject to a restraint, I do not think that there is a 'restraint of princess'". In the present case, if the construction of clause 8 as contended for by the Crown is accepted, the provisions of clause 4 (II) that in the event of the ship arriving and anchoring off the port lay time should commence from that time, were doomed from the very outset. I do not think that such a construction is a reasonable one.

[1] *(1949) 1 A. E. R. 522.*

[2] *(1915) 2 K.B. 774.*

In my opinion the learned trial Judge was wrong in holding that the period between anchoring off and admission to pratique should be excluded from the computation of lay time.

The judgment and decree appealed from are set aside. The claim in reconvention of the defendant is dismissed and judgment will be entered for the plaintiff as prayed for with costs in both Courts.

K. D. DE SILVA, J.—I agree. *Appeal allowed.*