

1900.
July 16.

ABDUL CADER v. ASIATIC STEAM NAVIGATION CO.

C. R., Colombo, 10,847.

Shipping—Bill of lading—Contract contained in—Action for non-delivery of goods—Overcarriage and transshipment—Loss of goods from decay—Liability of shipowner.

Perishable goods shipped by a steamer at Bombay to be conveyed to Colombo were overcarried to Galle, brought back by another steamer and tendered to plaintiff, when the goods were found to have decayed. The bill of lading contained a clause as follows : " In case the whole or part of the goods cannot from any cause be found for delivery or be delivered during the vessel's ordinary stay at the port of destination, the company is only bound to forward the goods to that port from any subsequent port of any other steamer to be at the risk of the owner of the goods."

In an action brought for the non-delivery of the goods, held, that the shipowner could not claim the benefit of the clause without proof on their part that the goods could not be found for delivery or be delivered.

THIS was an action for the recovery of Rs. 300, being the value of 146 bags of onions lost to the plaintiff by the conduct of the defendant company, who were the owners of the ship in which the goods were shipped.

The Commissioner found as follows :—

" The plaintiff had 200 bags of onions, among other things, shipped at Bombay on board the steamship *Nawab*, of which defendants are owners, to be conveyed to Colombo. The ship arrived in Colombo harbour on the 30th March, 1899, but only 54 bags were delivered to plaintiff. The remaining 146 were overcarried to Galle, landed there, and brought back by another steamer. They were tendered to plaintiff about the 10th April, that is, some eleven days after the arrival of the *Nawab* in the Colombo harbour. Plaintiff swears that the onions were then damaged, meaning apparently that they had decayed; this is not contradicted by the other side.

" Plaintiff's cause of action is not that the onions were damaged by any negligent act on the part of defendants, but that the 146 bags were not delivered to him."

And the Commissioner held that no delivery took place within a reasonable time after the steamship *Nawab* arrived in Colombo. and on the law of the case he held that, whether the onions were not tendered to plaintiff in proper time or tendered in a decayed condition, the plaintiff was entitled to succeed. Judgment was entered for plaintiff for Rs. 300.

Defendant company appealed.

1900.
July 16.

Maartensz, for appellant.—The appellants have discharged the onus on them, when it was proved that the defendants had tendered the bags of onions to the plaintiff. The bill of lading protected the appellants from all liability, and even in the case of their failure to deliver goods on the arrival of the steamer in Colombo, for the bill runs as follows:—

“ The company is not liable for any loss, damage, or detention caused directly or indirectly by any of the following causes (the causes are enumerated), *whether any of the perils, causes, or things above-mentioned, or the loss, injury, or detention therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, pilot, master,*” &c.

“ In case the whole or part of the goods cannot from any cause be found for delivery, or *be delivered*, during the vessel’s ordinary stay at the port of destination, the company is only bound to forward the goods to that port from any subsequent port of any other steamer.....to be at the risk of the owners of the goods.”

De Saram, for respondent.—The tender was made after the steamer had left the port of Colombo. The onions had been subsequently sent back to Colombo and the tender was then made, which was no tender under the bill of lading. Besides, if the defendants desired to protect themselves under the bill of lading, it was for them to show that some cause had arisen which would entitle them to such protection. Here none is shown, and the judgment was rightly given for the plaintiff.

Cur. adv. vult.

16th July, 1900. MONCREIFF, J.—

This was an action for damages for the non-delivery of 146 bags of onions shipped on board the steamship *Nawab* at Bombay for delivery in good order and condition to the plaintiff at the port of Colombo. The plaintiff alleges that in consequence of the non-delivery of the goods they were wholly lost to him.

In their answer the defendant company say that the goods “ were shipped at shippers’ risk, and the company took no responsibility therefor;” and that in fact, although they called upon the plaintiff to take delivery of the goods, the plaintiff refused to do so. It appears that upon the arrival of the *Nawab* at Colombo 54 bags of onions were delivered from her to the plaintiff; but the 146 bags in question were carried on to Galle and brought back to Colombo in the steamship *Nadir*, when the plaintiff refused to accept them.

1900.
 July 16.
 MONCRIEFF,
 J.

The following issue was framed with the consent of the parties:
 "Did the defendants fail to deliver or tender to the plaintiff 146 baskets of onions?"

No witness was called for the defendants, but it was urged that what they did amounted to a delivery, and that they were absolved by the exceptions and conditions of the bill of lading from all responsibility for any damage sustained by the plaintiff. The bill of lading may not, strictly speaking, be the contract, because it is not signed until the goods are on board, but when—as in this case—it is not qualified by other stipulations it is binding upon the parties. Among the exceptions and conditions which it contains is one to the effect that "the company is not liable for any loss, damage, or detention caused directly or indirectly by any of the following causes (the causes are enumerated), *whether any of the perils, causes, or things above-mentioned, or the loss, injury, or detention therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, pilot, master,*" &c.

I have some doubt as to whether this condition could come into play under the issue framed; but I think it has no bearing on the case, because the loss did not "arise from any of the perils, causes, or things above-mentioned." Moreover, if the defendants made a tender of delivery, there is an end of the plaintiff's claim, and if they **did not** make a tender of delivery they cannot take the benefit of a plea that the goods were shipped at shippers' risk. The phrase refers to the ordinary risks of the voyage, and does not absolve the shipowner from the duty to deliver if he has the goods on board (*D'Arc v. L. & N.W. Ry. Co.*, *L. R. 9 C. P. 325*).

If the voyage ended on the arrival of the *Nawab* the defendants were bound—in the absence of contract—to make delivery at that time.

Now, there is a clause in the bill of lading to the effect that "in case the whole or part of the goods *cannot* from any cause be found for delivery, or *be delivered*, during the vessel's ordinary stay at the port of destination, the company is only bound to forward the goods to that port from any subsequent port of any other steamer.....to be at the risk of the owners of the goods." Such provisions may be hard, but there is no reason why they should not be enforced. The company, however, has offered no evidence upon this point. We do not know whether the goods were overcarried because they *could not* "be found for delivery or be delivered;" and the defendants cannot claim the benefit of this clause.

Now, to quote the words of Lord Esher in *Leduc v. Ward* (20 *Q. B. D. (1888) 481*), "if the only voyage mentioned in the bill of

“ lading is from the port of shipment to the port of destination, it
“ must be a voyage on the ordinary track by sea of the voyage from
“ the one place to the other.” There is a clause permitting trans-
shipment and deviation in this case. So that those matters do not
arise; but it is well established that, where there is no contract to
the contrary, transshipment or deviation is only to be justified by
circumstances amounting more or less to necessity. And in the
latter case it is not for the shippers to show that the damage to
their goods resulted from the deviation (*Davis. v. Garrett, 6*
Bing. 724). The contract is for a particular voyage, and if it
permitted the shipowner as he pleased to overcarry to Hongkong
or Cape Town, it would be impossible to carry on business. In
the ordinary course it is the duty of the master, when his ship has
arrived at the port of destination, to deliver the cargo to the
merchants or his consignee, upon production of the bill of lading
and payment of the freight and other charges due in respect of
it. The company have adduced no reasons absolving them from
that duty, and I think the Commissioner was right in entering
judgment for the plaintiff for the amount claimed.

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