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1969 Present : H. N. G. Fernando, C.J., and Wijayatilake, J.

ALAGASUNDERAM CHETTIAR and another, Appellants,
and THE INDIAN BANK LTD., Respondent

S. C. 81-82/65 (Inty.)—D. C. Colombo, 52875/M

Carriage of Goods by Sea Ordinance (Cap. 85)—Schedule, Article I (e), Article II, Article III Rule 6, Article IV Rules 1 and 2—Meaning of expression “loss or damage”—Time limitation in Article III Rule 6—Circumstances when it is applicable—Inapplicability in case of misdelivery of goods to wrong person.

The provision in Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Ordinance that “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” does not apply to a case where the carriage contemplated in the bill of lading has been duly completed by the discharge of the shipment consigned to Ceylon. Nor is the time limitation in Rule 6 applicable to a case where the carrier or its agent has caused a complete misdelivery of the goods to some person other than the person entitled to delivery.

APPPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *D. S. Wijewardena*, for the 2nd defendant-appellant in S. C. 81/65 and for the 2nd defendant-respondent in S.C. 82/65.

C. Ranganathan, Q.C., with *J. A. L. Cooray* and *Gamini Dissanayake*, for the 1st defendant-respondent in S.C. 81/65 and for the 1st defendant-appellant in S.C. 82/65.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte*, *K. N. Choksy* and *E. B. Paul Perera*, for the plaintiff-respondent in both appeals.

Cur. adv. vult.

January 15, 1969. H. N. G. FERNANDO, C.J.—

The plaintiff in this action was the holder of certain Bills of Lading relating to a shipment of goods which was despatched from Tuticorin to Colombo on a ship of which the 2nd defendant is alleged to have been the owner, proprietor or operator. The 1st defendant is alleged to have been carrying on the business of shipping agents and also to have been the Agent in Colombo of the 2nd defendant.

According to the allegations in the plaint, the goods in question were brought in the said ship to Colombo and were duly landed ashore in Colombo. The plaint further alleged that it was the duty and business of the 2nd defendant and/or the 1st defendant acting as Agent for and on behalf of the ship and/or the 2nd defendant to give delivery of the goods in terms of the Bills of Lading to the plaintiff, but that neither the 1st defendant nor the 2nd defendant gave such delivery. It was further alleged that the 1st defendant by its servants or agents wrongfully or unlawfully gave delivery of the goods to persons other than the plaintiff and that the 2nd defendant is liable in law for the negligence or fraud or the breach of duty aforesaid.

Upon the basis mentioned above, the plaintiff prayed for a sum of Rs. 48,000 odd as the loss or damage suffered by him, in consequence of the failure on the part of the 1st and/or the 2nd defendant to deliver the goods to the plaintiff.

Several issues were framed at the trial, some of which raised the question whether the liability of any of the defendants ceased when the goods had been duly discharged from the ship at the Port of Colombo. In addition, Counsel appearing for the defendants framed issues No. 17, 18, 19 and 24 which were as follows :—

“ *Issue No. 17*

Has this action been brought within one year of the date on which the goods should have been delivered ? ”

“ *Issue No. 18*

If the answer to Issue No. 17 is in the negative, is the present suit time-barred ? ”

“ *Issue No. 19*

(a) Can the 1st defendant and the 2nd defendant be sued together in one and the same action? ”

(b) If not, can the plaintiff maintain this action? ”

“ *Issue No. 24*

In any event is the 2nd defendant discharged from any liability to the plaintiff in respect of loss or damage sustained by him as more than one year has elapsed from the date on which the goods should have been delivered? ”

Counsel for the defendants moved that these issues be decided as preliminary issues. In addition the learned trial Judge also regarded issues Nos. 13 and 20 as preliminary issues :—

“ 13. Did the liability of the defendants, if any, to the plaintiff cease as soon as the said goods were lifted from and left the ship's side at the Port of Colombo? ”

20. If any or all of the issues (12) to (18) are answered in the affirmative, are the defendants under any legal liability to the plaintiff in respect of the said goods? ”

Although the order of the learned trial Judge against which the 1st and 2nd defendants have appealed to this Court does not give separate answers to the issues which have been reproduced above, the learned trial Judge concludes his order by a statement that all the preliminary issues are answered against the defendants, and he has further directed that the trial will proceed on the other issues.

The issues numbered 17, 18 and 24 were designed to invoke the provisions of Article III Rule 6 of The Hague Rules which were given statutory effect by Ordinance No. 18 of 1926 (Cap. 85 of the 1956 Edition of our Enactments), and which are set out in the Schedule to that Ordinance. The same Rule 6, upon which the defendants here rely, was considered in the judgment of this Court in *Sri Lanka Shipping Co., Ltd. v. The Indian Bank Ltd.* (S.C. 441/64 F, S.C.M. of 1st March 1968)¹, and the judgment sets out my reasons for holding that the time limitation in Rule 6 does not apply in a case where only a mis-delivery of goods, and not actual physical loss of goods is involved.

Counsel for the 2nd defendant has argued that the recent case was wrongly decided by this Court, and in support of that argument he relied on the decision of the House of Lords in the case of *Admastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*² One of the matters which arose for decision in that case was the construction of statutory provision in United States law corresponding to the provision contained in Article IV Rule 1 and Article IV Rule 2 of the Schedule to our Ordinance, Cap. 85; the particular question of construction was “ do the words ‘ loss or damage ’ in s. 4 (1) or s. 4 (2) of the Act relate only to physical loss of, or damage to, goods? ”.

In deciding this question Viscount Simonds approved and adopted the reasoning and conclusion of Lord Devlin in the lower Court which was as follows :—

“ The last question asks whether the words ‘ loss or damage ’ in s. 4 (1) and (2) of the Act relate only to physical loss of or damage to goods. The words themselves are not qualified or limited by anything in the section. The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual

¹ (1968) 71 N. L. R. 361.

² (1957) 1 A. E. R. 673; and (1958) 1 A. E. R. 725.

liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words 'loss or damage' should be limited to physical loss or damage. The only limitation which is, I think, to be put on them is that which is to be derived from s. 2 which is headed: 'Risks'. The 'loss or damage' must, in my opinion, arise in relation to the 'loading, handling, stowage, carriage, custody, care and discharge of such goods', but is subject to no other limitation. In *G. H. Renton & Co. Ltd. v. Palmyra Trading Corpn. of Panama* (5) (1956) 3 All E.R. 957, the House of Lords held that the words 'loss or damage to or in connection with goods' in Art. III, r. 8, were not limited to actual loss of or physical damage to the goods; and I should give the same meaning to 'in relation to' as to 'in connection with'." (*Anglo-Saxon Ltd. v. Admastors Ltd.* (1957) 1 A.E.R. 673 at p. 680).

With much respect I would adopt the opinion of Devlin, J. that the "loss or damage" which is referred to in our Article IV must mean a loss or damage in relation to what is specified in our Article II, that is, "the loading, handling, stowage, carriage, custody, care and discharge of goods", and I agree that the expression "loss or damage" in Rule 6 of Art. III must have the same meaning. Since this aspect of the matter was not taken into account in my judgment in the recent *Sri Lanka Shipping Co.* case, Rule 6 of Art. III has now to be examined as read with Art. II.

Article II of the Schedule to our Ordinance (Cap. 85) corresponds to s. 2 of the American Act to which Lord Devlin referred. This Article declares in general terms that the responsibilities and liabilities, and the rights and immunities, set forth in the subsequent Articles will be those to which a carrier will be subject, and entitled, respectively, in relation to the *loading, handling, stowage, carriage, custody, care and discharge* of goods. The list here specified indicates in my opinion an intention to regulate the duties and rights of a carrier from the stage (of loading) when the carriage is about to commence, until the stage (of discharge) when the carriage ends. The same intention is quite clearly indicated in the definition of "carriage of goods" in Article I of the Schedule:—

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

In the present case, however, as also in the *Sri Lanka Shipping Co.* case recently decided in this Court, the carriage contemplated in the bill of lading had been duly completed by the discharge of the shipment consigned to Ceylon. The loss or damage alleged by the plaintiff in this case is therefore not one in relation to any of the matters which are regulated by the provisions in the schedule to Cap. 85. On this ground, which was not relied on in the judgment in the recent case, I hold that the limitation in Article III Rule 6 does not apply to the present action.

Although this finding is conclusive of the question whether the plaintiff's action is time-barred, further examination of Rule 6 Article III has revealed additional reasons for the opinion expressed in the recent case that its provisions are inapplicable to a case of alleged loss by misdelivery ashore.

Thus the first paragraph of Rule 6 requires "notice of loss or damage and the general nature of such loss or damage" to be given to the carrier or its agent before or at the time of the removal of the goods into the custody of the person entitled to delivery; and the second paragraph states that the notice need not be given "if the state of the goods as at the time of their receipt has been the subject of joint survey or inspection". The fourth paragraph of Rule 6, again, affords to both the carrier and the consignee an opportunity for inspection and tallying, with a view obviously to ascertaining the nature and extent of loss or damage to goods. Hence, the 1st, 2nd and 4th paragraphs of Rule 6 when considered together are wholly applicable in a case in which a consignee is removing or about to remove the goods, and at that stage becomes aware of actual or apprehended loss or damage, in which event he must immediately or within three days give notice to the carrier in order that the latter himself may by survey or inspection investigate the correctness of the consignee's complaint; and if a proper notice of alleged loss or damage is not given, the fact of removal becomes *prima facie* evidence of due delivery. I can see nothing in these three paragraphs which is reasonably applicable in a case where no goods are available for removal by a consignee, for the reason that the carrier or its agent has, as is alleged in the instant case, caused a complete misdelivery to some person other than the person entitled to delivery.

It will be seen that the limitation clause which requires suit to be brought within one year after delivery or after due date for delivery is to be found in the 3rd paragraph of Rule 6, and that this 3rd paragraph is (if I may be permitted the expression) "sandwiched" between paragraphs, the terms of which are applicable only to actual physical loss or actual physical damage. I thus see very good reason for the opinion that the 3rd paragraph was intended to apply only in case where goods delivered are alleged to be damaged or where there is an alleged short delivery.

I would add also that at the least it is doubtful whether the adoption by the Legislature of a Rule in such uncertain terms can be regarded as having amended the provisions of the Prescription Ordinance in its application to a claim of the nature made by the plaintiff in the instant case.

For these reasons I must adhere in the construction placed by this Court upon Rule 6 in the case of *Sri Lanka Shipping Co. Ltd. v. The Indian Bank Ltd.* Counsel for the defence has adverted to the risk that, if no appeal to the Judicial Committee is taken from the present judgment

at this stage, the defence may be precluded from ultimately appealing against the present judgment on the point which I have been discussing. I must add therefore that although the present judgment will be binding upon both the District Court and this Court in any further proceedings in the present action, the defence will be entitled to rely upon the limitation clause in Rule 6 in any appeal which may ultimately be preferred from the final determination of this Court of the present action.

In the result I affirm the finding of the trial Judge in this case that the issues numbered 17, 18 and 24 must be answered in favour of the plaintiff.

In regard to issue No. 19, relating to alleged misjoinder, and to issues Nos. 13 and 20, we are of opinion having regard to certain arguments raised before us that a proper answer to those issues may depend on evidence concerning the custom and practice in the Port of Colombo and the functions relating to delivery of goods to consignees which are performed by carriers and their agents. We set aside *pro forma* the findings of the learned trial Judge on those issues, and direct that they be answered only at the end of the trial.

The costs of this appeal will abide the ultimate decision of the case.

Case sent back for trial on certain issues only.
