SRI LANKA PORTS AUTHORITY AND ANOTHER

v.

JUGOLINIJA–BOAL EAST

SUPREME COURT.
SAMARAKOON, C. J., SAMERAWICKRAME, J. AND ISMAIL, J.
S.C. No. 66/79–D.C. No. 1/757 (M).
NOVEMBER 5, 1980 AND FEBRUARY 23, 1981.

Contract–Port (Cargo) Corporation –Common carrier–Duty cast by statute–Plea of immunity–How taken–Port (Cargo) Corporation Act, No. 13 of 1958, sections 4(1), 4(1)(b), 5(1)(g), 79–Documents read in evidence without objection at close of case–Administration of Justice Law, No. 21 of 1975, section 457–Evidence Ordinance, section 32(2).

The plaintiff claimed from the Port (Cargo) Corporation the value of the cargo short-loaded during transhipment in the Port of Colombo on the basis that the Corporation was under a contractual duty to keep the cargo in safe custody and to re-load the same for onward carriage. In the alternative, the plaintiff pleaded that the loss was caused by the negligence of the Corporation's officers and agents. The defendant pleaded the benefit of an immunity set out in section 79 of the Port (Cargo) Corporation Act, No. 13 of 1958.

It was contended, inter alia, on behalf of the Corporation:

(a) that the Corporation was not a common carrier and was not liable as such;

(b) that the plaintiff was only the ship owner and not a true owner of the goods and therefore, there is no proof that it was liable to the true owner of the goods or that it made good the loss to the true owner;

(c) that the plaintiff's claim fails in view of the immunity set out in section 79 of the Port (Cargo) Corporation Act.

Held

(a) The statute casts on the Port (Cargo) Corporation a duty in law to provide such services as are referred to in section 4 of the Act. The Corporation held itself out to all and sundry that it would do the work, *inter alia,* of stevedoring provided its charges were paid. The fact that it did so under a statutory duty and under a statutory monopoly is immaterial. The fact that it held itself out as willing to carry goods for any person provided it was paid the proper charges, made it a common carrier and/or carrier by trade.

(b) Since no issue was raised in regard to the plaintiff's liability to the true owner of the goods and such a dispute was not presaged in the answer, the question cannot be raised in appeal.

(c) Where the benefit of the immunity set out in section 79 of the Act is claimed, the facts and circumstances relied on must be clearly pleaded and strictly proved. A mere

statement of the fact of the loss coupled with the plea that such loss was not occasioned by negligence or wrongful or unlawful act, is not a claim of immunity within the meaning of section 79 of the Act.

Per Samarakoon, C. J.
"If no objection is taken, when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the *cursus curiae* of the original civil courts."

Cases referred to
Morris Roche Ltd. v. Port (Cargo) Corporation, (1967) 71 N.L.R. 195.
Johnson v. Midland Railway Co., (1849) 4 Ex. 367.

APPEAL from a judgment of the Court of Appeal.

Mark Fernando, with *Miss A. K. Wickramasinghe,* for the defendants-appellants.
Nimal Senanayake, with *K. P. Gunaratne, Miss S. M. Senaratne, Saliya Mathew,* and *Mrs. A. B. Dissanayake,* for the plaintiff-respondent.

Cur. adv. vult.

March 23, 1981.
SAMARAKOON, C. J.

This case arises out of the loss of cargo during transhipment in the Port of Colombo. The m.v. "VELEBIT" carrying cargo for onward shipment to Rangoon in Burma entered the Port of Colombo on 7th June, 1974. The cargo consisted of cartons which were unloaded into lighters belonging to the Port (Cargo) Corporation (second defendant-appellant hereinafter referred to as the 'Corporation') by the Corporation's employees. They were reloaded on the 3rd July, 1974, on board the m.v. "TRIGLAV" lying in the Port of Colombo. Thirty-seven cartons were short loaded, of these 6 cartons were subsequently accounted for, and the Corporation admits that it short loaded 31 cartons, in respect of which this claim is made.

The plaint is interesting for its brevity if not for its paucity. It does not state what interest, if any, the plaintiff-respondent had in the cargo or the motor vessel. It merely states that cargo from the m.v. "VELEBIT" was discharged by the Corporation pursuant to a contract entered into between the Corporation and the Ceylon Shipside Services Ltd. acting as agents for the plaintiff-respondent. It states further that the Corporation was under a contractual duty to keep the cargo in safe custody and reload same for onward carriage to Rangoon. This reloading was

done on the 3rd July on the m.v. "TRIGLAV" but a quantity of 31 cartons of bleached mercerised cotton yarn was short loaded. The plaintiff-respondent claimed its value of Rs. 103,780.90 (US $12,900.05) with legal interest. In the alternative the plaintiff-respondent pleaded that the loss was caused by the negligence of the Corporation's officers and agents. The Corporation in its answer admitted the short loading of 31 cartons but said it was unaware of their contents, description and value. It denied any contractual obligation to reload on board m.v. "TRIGLAV" but avoided stating the exact nature of transaction, legal or otherwise, by which it came to discharge the m.v. "VELEBIT" and to reload the same on the m.v. "TRIGLAV". It also pleaded the benefit of an immunity set out in section 79 of the Port (Cargo) Corporation Act No. 13 of 1958.

At the trial the following issues were framed:

"1. Did the defendant Corporation in about June, 1974, enter into a contract with the plaintiff's agent to discharge cargo ex m.v. "VELEBIT" and to keep such cargo in safe custody and reload on board m.v. "TRIGLAV"?

2. Of the said cargo has the defendant short loaded 31 cartons?

3. If so, what damages is the plaintiff entitled to recover from the defendant?

4. In any event, were 31 cartons of the said cargo short loaded on account of the negligence of the defendant?

5. If so, what damages is the plaintiff entitled to recover?

6. In any event, can the plaintiff have and maintain this action in view of section 79 of the Port Cargo Corporation Act?"

The Corporation did not raise any issue on value but had it recorded that it disputes the value and description of goods. After trial the learned District Judge answered all the issues in the plaintiff's favour and entered judgment in the sum claimed. The Corporation appealed to the Court of Appeal and that appeal was dismissed. This Court granted the Corporation special leave to appeal.

Counsel for the appellants has advanced a fourfold argument:

1. That the Corporation was not a common carrier and was not liable as such.

2. The plaintiff-respondent was only the ship-owner and not the true owner of the goods. There is therefore no proof that it was liable to the true owner of the goods or that it made good the loss to the true owner.

3. The contents of the cartons and their value were not admitted and plaintiff-respondent has failed to prove these facts.

4. Damages have not been proved.

With regard to the first contention counsel for the appellants submitted that the case was not fought on the basis that the Corporation was a common carrier. Paragraph 4 of the plaint pleads that the Corporation "in the ordinary course of its business entered into a contract with Ceylon Shipside Services Ltd. acting as Agents for the plaintiff-respondent to discharge cargo ex-VELEBIT in June 1974 and to keep such cargo in safe custody and reload same on the orders of the plaintiff's Agents for onward carriage to Rangoon". The Corporation denies any contractual obligation but states that when the m.v. "VELEBIT" arrived at the Port of Colombo on the 7th June, 1974, the cargo in question was discharged by its employees into lighters belonging to it. They remained in the lighters till they were loaded onto the m.v. "TRIGLAV" which arrived in the Port on the 3rd July, 1974. The Corporation contends that it was merely discharging a statutory function under the Port (Cargo) Corporation Act of 1958 "by virtue of the fact that the plaintiff (respondent) is compelled to make use of the services of the defendant (Corporation) in the Port of Colombo", and therefore no question of contract arises in this matter. This contention means that the respondent willy nilly had to let the Corporation discharge and tranship the cargo. In the result no contractual relations could arise.

Section 4 (1) of the Act 13 of 1958 imposed on the Corporation the general duty of providing in the Port of Colombo "efficient and regular services" (referred to as Port Services) "for stevedoring, landing and warehousing cargo, wharfage, the supply of water and

the bunkering of coal and any other services incidental thereto". At all times material to this case the Corporation had the monopoly of providing such services in the Port of Colombo as no rival was permitted by law. Section 4 (1) (*b*) cast on it the general duty to conduct its business in such manner and to make such charges for services rendered as to secure a proper and sufficient revenue for the Corporation. Section (5) (1) (*g*) empowers it to enter into contracts in these words:

> "(*g*) to enter into and perform all such contracts as may be necessary for the performance of the duties and the exercise of the powers of the Corporation;"

No express contract has been entered into in terms of the above provision for transhipping the cargo of the m.v. "VELEBIT" but levies have been made according to charges set out in a circular dated 23.11.1973 sent to all Steamer Agents (P2). E. H. Joseph, a witness for the plaintiff-respondent, stated that transhipment of the cargo was entrusted to the corporation and that he, on behalf of the respondent, was bound to pay the charges set out in P2 which were in fact rates agreed upon between the corporation and steamer agents operating in Colombo. It is therefore necessary to decide the exact legal status of the corporation and the legal nexus as between the parties. The statute casts on the Port (Cargo) Corporation a duty in law to provide such services as are referred to in section 4 of the Act. Stevedoring is one of them. (*Vide* section 80). In the absence of such a statutory obligation ships entering the Port of Colombo would be left high and dry by an unreasonable monopolist. The manner of providing such services has been left to the corporation with only a stipulation that they be regular and efficient. The corporation held itself out to all and sundry that it would do the work *inter alia* of stevedoring provided its charges (which had been previously notified to all concerned) were paid. These were services which had been provided by private stevedores in the harbour before the corporation assumed a monopoly over such trade. The fact that it did so under a statutory duty and a statutory monopoly then becomes immaterial. The fact that it "held itself out as willing to carry goods for any person provided it was paid the proper charges" made it a common carrier and/or a carrier by trade, per Samerawickrame, J. in *Maurice Roche Ltd. v. Port (Cargo) Corporation* (1) at 199. Every person who requires the services of a stevedore in the Port of Colombo has the right to call on the Corporation to receive and

carry goods according to its public profession and the Corporation is bound to do so if payment is made or offered in accordance with published rates. Any refusal entails liability. *Johnson v. Midland Railway Co.* (2). I am in complete agreement with this statement of the law and I hold that the corporation is a *common carrier.* I am also in agreement with Samerawickrame, J. that there was a continuing offer by the Corporation to carry goods of all persons who required their services and "when the goods were discharged by the Master of the vessel into a lighter of the (Corporation), there was an acceptance of that offer and consequently an implied or tacit contract". (*Vide* ibid page 199).

The next question raised was that the respondent was not the true owner and there was no evidence that he was liable to the true owner or that he made good the loss. The trial has proceeded on the basis that the respondent was the ship owner and therefore the carrier of the goods. Such a dispute was neither presaged in the answer nor was any issue raised on it to be decided by the Judge. It cannot be raised now in appeal.

The further question to be decided is the contention that the respondent has failed to prove the contents and value of the cartons and therefore the claim for damages must fail. The trial Judge has accepted the evidence of witness Joseph as to the value and contents of the cartons. Document D1 dated 26.01.76 written by the Agent of the respondent to the corporation refers to a claim in respect of "mercerised cotton yarn". The reply to it by the Corporation (D2) is a mere denial of liability. Those with other documents, listed by the corporation, were not objected to by the respondent at the preliminary hearing of the case. They were marked in evidence at the trial. Their contents were therefore in evidence of the facts stated therein without the maker being called (*vide* section 457 Administration of Justice Law, No. 25 of 1975). The learned trial Judge has also relied on the contents of document P1 written to the Agents in Sri Lanka by their Agents in Rangoon. At the preliminary hearing Counsel appearing for the appellants stated that he was admitting all documents listed by the respondent except documents listed in item 7 in column II. P1 was one of item 7. When P1 was marked during the trial objection was taken "as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by

counsel for the appellants who then proceeded to lead his evidence. If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the *cursus curiae* of the original Civil Courts. The contents of P1 were therefore in evidence as to facts therein *(vide* section 457 Administration of Justice Law, No. 25 of 1975) and it is too late now in appeal to object to its contens being accepted as evidence of facts. Furthermore the trial Judge has, in the course of his order, accepted the document in evidence in terms of the provisions of section 32 (2) of the Evidence Ordinance. I cannot therefore agree with the contention that the order of the trial Judge on this point is wrong.

In the course of the argument reference was made to the provisions of section 79 of the Port (Cargo) Corporation Act. It reads thus:

> "79(1) All goods which are lodged or deposited in any such warehouse or other place of deposit as is provided or approved by the Government or which are carried in any lighter or barge of the Corporation shall be at the risk of the owner, importer, exporter, shipper or consignee of such goods, and he shall have no claim on the Corporation for the loss of any such goods, or any damage to any such goods, caused by fire, theft or other cause unless such loss or damage has been caused by the negligence or by the wrongful or unlawful act of the Corporation or of any of its officers, servants or agents.
>
> (2) Nothing in sub-section (1) shall preclude the Corporation from making any ex-gratia payment to any person in respect of any loss or damage referred to in that sub-section."

Originally the section did not provide for carriage in a lighter or barge nor did it include 'exporter' and 'shipper'. These were brought in by amending Act No. 67 of 1961. The immunity must be clearly pleaded and strictly proved. This immunity extends to loss by "fire, theft or other cause". Such a cause has not been pleaded by the appellants and the Court was not seized of any facts upon which it could have held that the Corporation was immune from liability in this case. It is when the cause is alleged and/or proved that the claimant is in a position to establish that the loss so caused was occasioned by the negligence or by the wrongful or unlawful act of the Corporation or of any of its officers, servants or agents. As the immunity is in respect of the

loss of or damage to goods which are lodged or deposited in a warehouse or place approved by the Government or are being carried in a barge or lighter of the Corporation, the fact or circumstance relied on must be pleaded. Having regard to the above considerations merely stating the fact of the loss of 31 cartons coupled with a plea that such loss was not occasioned by negligence or wrongful or unlawful act is not a claim of immunity within the meaning of section 79 of the Act.

I dismiss the appeal with costs.

SAMERAWICKRAME, J.—I agree.

ISMAIL, J.—I agree.

Appeal dismissed.