

Present: Schneider J. and Maartensz A.J.

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485.—D. C. Colombo, 190.

Sale of goods—Delivery conditional on payment—Mate's receipt sent by value-payable post—Risk of loss in transhipment.

Where a seller shipped goods to a buyer and sent the mate's receipt by value-payable post, thereby intending to make the delivery of goods conditional on payment,—

Held, that the property in the goods did not pass to the buyer on delivery to the carrier, and that the risk of loss in transport fell on the seller.

APPEAL from a judgment of the District Judge of Colombo. The plaintiff sued the defendant for the recovery of a sum of Rs. 533.21, the value of goods sent by the plaintiff from Colombo in the ss. "Lady McCallum" to the defendant at Trincomalee. The steamer was wrecked and the goods lost. It was proved that the course of business adopted was that the plaintiff should send a document called the mate's receipt by value-payable post to the defendant, so that the latter was unable to obtain delivery of the goods until he had paid their full value. The defendant resisted the claim on the ground that the plaintiff had consigned the goods at his own risk. The learned District Judge held in favour of the plaintiff.

H. V. Perera (with *L. A. Rajapakse*) for defendant, appellant.—Section 18 of the Sale of Goods Ordinance prescribes the rules for ascertaining the intention of the parties as to when the property in the goods is to pass. But here there was no "unconditional appropriation" of the goods to the contract. The property in the goods would not pass until the appellant paid the value of the goods and took delivery of the mate's receipt, which had been sent by V. P. P. The risk therefore was with the person in whom the title was at the time the "Lady McCallum" went down, *i.e.*, with the plaintiff. The appellant is therefore not liable for the value of the goods:

Counsel cited *25 Hals. p. 181; Bryans v. Nix*¹; and *Schuster v. Mc.Kellar*.²

N. K. Choksy, for plaintiff, respondent.—As this was a sale at prices for delivery at the plaintiff's stores, there was an unconditional appropriation of goods to the contract, when the plaintiff selected

¹ (1839) 4 M. & W. 775.

² (1857) 7 E. & B. 704.

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the particular articles for shipment to the defendant. The property therefore passed to the defendant at that time. Or else, the property passed at the time the plaintiff delivered the goods on board and got the mate's receipt signed, giving the name of the defendant as the consignee.

Even if the property had not passed, the defendant must be deemed to have "agreed" to take the risk (section 20, Sale of Goods Ordinance). Although ordinarily the risk passes with the property it is possible to sever the two, and for the risk to be in the buyer whilst the property remains in the seller.

Where the buyer nominates the mode of conveyance and the seller follows the buyer's instructions, the risk is with the buyer. Here the buyer requested the seller to send the goods by steamer leaving on a particular date, which was the scheduled date of sailing of the "Lady McCallum," and that was the only ship plying between Colombo and Trincomalee.

Delivery to a carrier is delivery to the buyer, more especially when the carrier is one "specially pointed out by the consignee." *Dunlop v. Lambert*¹; *Chalmers' Sale of Goods*, p. 198; *Benjamin on Sale* (6th ed.), p. 452 et seq. and p. 459; *Stock v. Inglis* 10 App. Case 263.

There would have been a "reservation of the right of disposal" if the plaintiff had taken the mate's receipt in favour of himself or his order. But here the plaintiff took it in favour of the defendant. Once the mate's receipt was posted the plaintiff had no control over it. That was only a mode of recovering payment.

July 25, 1927. SCHNEIDER J.—

In this action the plaintiff sued the defendant for the recovery of a sum of Rs. 533.21 as being the value of goods sent by the plaintiff from Colombo in the ss. "Lady McCallum" to be delivered to the defendant at Trincomalee. The ss. "Lady McCallum" was wrecked, and the goods lost. The defendant resisted the claim on the ground that the plaintiff had consigned the goods at his own risk, and that the terms of the contract for the sale of the goods was "cash before delivery." The evidence proves that the plaintiff and the defendant had been doing business for some time, the plaintiff despatching goods by the line of steamers to which the ss. "Lady McCallum" belonged. It was not usual to obtain bills of lading for the goods so despatched, the usual document being a mate's receipt in the form of the document P 7, which states that the Steamship Company, Limited, had at Colombo "received on board the ss. 'Lady McCallum' from M. E. Othman to G. H. Jinadasa the

¹ (1839) 6 Cl. and Firm at pp. 620-621.

under-mentioned goods for port of Trincomalee.” The goods are then described in detail. Below appears—

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“ Freight, Rs. 15.12 paid here by shipper.

“ This shipping order is issued subject to the clauses appearing in the Ceylon Steamship Co.’s, Ltd., bill of lading, which can be signed for these goods if desired Consignee will please arrange with the agents at the different ports to take delivery of cargo immediately on arrival of steamer

“ Notice.—Packages will only be delivered at port of destination on presentation of this document properly signed ”

This mate’s receipt is usually sent by value-payable post, that is to say, the consignee is unable to obtain delivery of the goods until he has paid the full value of the goods and obtained delivery of the mate’s receipt from the Post Office. The plaintiff’s manager, who had sent these goods, in giving evidence stated, “ I am entitled to ask the Steamship Company to deliver these goods to any one I like if I take the mate’s receipt back. Unless the defendant takes the mate’s receipt, the Steamship Company will not give him ‘ delivery ’ . ” He also stated in his evidence that the defendant had asked that goods be supplied on credit, but that he had declined to do so, but had offered to supply for cash before delivery, and that it was in pursuance of this offer that the mate’s receipt was forwarded by value-payable post for the goods which were sent by the line of steamers, which is the only steamship line carrying goods from Colombo to Trincomalee. The issues framed at the trial covered the dispute between the parties. The simple question is, whether the goods were being transported at the risk of the defendant. The learned District Judge held in favour of the plaintiff and gave him judgment.

This appeal is by the defendant. Now, the general rule is that in the absence of an agreement to the contrary the goods remain at the seller’s risk until the property therein is transferred to the buyer. But when the property therein is transferred to the buyer the goods are at the buyer’s risk, whether delivery has been made or not (*see* section 20 of the Sale of Goods Ordinance¹). It becomes, therefore, necessary to ascertain whether the property in these goods had passed to the buyer, and if they had not, whether there was any agreement by which he undertook the risk during transport. The contract, I think, should be regarded as one for the sale of unascertained goods. That being so, no property in them was transferred to the buyer unless and until they were ascertained (section 16). The packing and delivery of the goods on board the ship should be regarded as an appropriation of the goods to the

¹ No. 11 of 1896.

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contract with the assent of the buyer given before the appropriation was made. If the plaintiff in delivering these goods did not reserve a right of disposal of them, he would be deemed to have unconditionally appropriated the goods in question to the contract (section 18, rule 5). The question, therefore, for decision resolves itself into whether the plaintiff reserved, or did not reserve, a right of disposal until a certain condition was fulfilled, namely, the payment for the goods by the defendant. In my opinion he did reserve this right of disposal by forwarding the mate's receipt by value-payable post. As the plaintiff himself states, he was entitled to obtain delivery of the goods to any one he named so long as he held the mate's receipt. Section 19 of the Ordinance makes it clear that in such a case, notwithstanding the delivery of the goods to a carrier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the condition imposed by the seller is fulfilled; and that where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him. I am unable to see how the present case can be regarded as not coming within the provisions of section 19 of the Ordinance. There is no element in this case showing that the buyer undertook the risk during transport. The case is in nowise different from that in which a shopkeeper sends goods to a customer by value-payable post. Supposing the parcel is lost in the post, there can be no doubt that the loss would fall upon the shopkeeper and not on the buyer. The buyer has no control of the goods and has no right to them until he has paid the amount of the value of the goods. I therefore allow this appeal with costs, set aside the decree of the District Judge, and dismiss the plaintiff's action, with costs.

MAARTENSZ A.J.—

This was an action to recover the value of certain goods which were lost with the ss. "Lady McCallum," and the cost of freight, cart hire, and loading charges.

The facts for the purposes of the appeal are not in dispute. They are as follows:—The defendant, a merchant in Trincomalee, by letter P 8 dated December 24, 1925, requested the plaintiffs, who trade in Colombo, to send him by the steamer leaving on December 29 the goods in question.

The only steamer due to sail from Colombo for Trincomalee was the "Lady McCallum," and the goods were put on board on December 28, 1925. The cases containing the goods were marked "G.H.J." defendant's initials. Freight was paid by the shipper.

The Steamship Company issued what is called a mate's receipt (P 7) for the goods.

The receipt runs as follows:—

CEYLON STEAMSHIP COMPANY, LIMITED.

Colombo, December 28, 1925.

Received on board the ss. "Lady McCallum" from M. E. Othman to G. H. Jinadasa the under-mentioned goods for port of Trincomalee:—

Marks				
or Address.				
	1 case hurricane lamps 1/3	...	1 2 0	
	1 case vinegar 1/1	...	0 2 0	
G. H. J.	1 case umbrella soap 1/1	...	0 2 0	
	1 case sunlight soap 1/1	...	0 2 0	
	2 cases shop goods 1/3, 1/4	...	3 2 0	
	1 bundle mamoties (2 doz.) (5c. ft.)	...	0 2 0	

—
7
—

(Sgd.) T. HOPE EVANS,
Chief Mate.

Freight, Rs. 15.12 paid.

Notice.—Packages will only be delivered at port of destination on presentation of this document properly signed.

The defendant could not obtain delivery of the goods without the mate's receipt, and in accordance with the course of business between the plaintiffs and the defendant, it was sent to him by a value-payable letter on, according to P 5 E, December 31. The amount payable for the letter by the addressee was Rs. 533.31. This sum included the sum of Rs. 15 paid by the shipper as freight.

The goods were lost with the "Lady McCallum" on the evening on January 1, 1926. The defendant refused to pay for and take delivery of the letter containing the mate's receipt, which was returned to the plaintiffs.

The plaintiffs next sent it to defendant by ordinary post who replied on January 10 that he would take delivery of the goods when they reached Trincomalee. The defendant by then was aware of the loss of the steamer and the goods.

It will be convenient here to refer to the evidence of the plaintiffs' manager as to the way in which he commenced doing business with the defendant and the manner in which that business was conducted.

In 1924 the plaintiffs' manager visited Trincomalee, and an arrangement was come to by which the defendant was to purchase goods from the plaintiffs for cash before delivery. The defendant's

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1927. request that he should have a month's credit was not acceded to. Accordingly the mate's receipt for goods ordered by the defendant was sent to him by value-payable post, and he used to pay the amount due on the letter and take delivery of the goods in exchange for the mate's receipts.

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The defendant was liable for the value of the goods *ex store* and the cost of cart hire, loading, and freight paid for by the shipper in the first instance were debited against and included in the amount payable by defendant on the letter sent by value-payable post.

No difficulty had arisen before, but the plaintiff alleges that if the defendant had not paid for and taken delivery of any parcel of goods he would have had them sold in Trincomlee and recovered the difference in price, if any, from the defendant.

The broad question in the case is, whether the plaintiff or defendant is to suffer the loss resulting from the wreck of the steamer carrying the goods.

The learned District Judge has answered this question in favour of the plaintiff upon two grounds. He holds (1) that the property in the goods passed to defendant when they left plaintiff's store or were put on board and a mate's receipt taken out in favour of defendant, and that the sending of the receipt by value-payable post was not intended to be a conditional appropriation subject to the payment of the price, but was sent in that way as usual as the means by which the defendant was in the habit of transmitting the price of the goods; (2) that even if the property had not passed, the defendant had assumed the right to instruct the plaintiffs to despatch by any form of conveyance he chose, and the plaintiffs merely acted as his agents to give effect to his wishes and carry out his orders, and that there was therefore an implied agreement by the defendant to undertake the risk of the transport of goods to Trincomalee.

It was contended in appeal that the possibility of a loss had never occurred to either plaintiffs or defendant, and that the facts did not disclose an implied agreement that the property should pass to the buyer as soon as they were put on board, notwithstanding the fact that the mate's receipt could not pass to the buyer until he had paid for the goods, and that by sending the mate's receipt by value-payable post the plaintiffs reserved the right of disposal, which prevented the property in the goods passing to the buyer.

I am unable to agree with the learned District Judge's opinion that the mate's receipt was sent to the buyer for the sole purpose of enabling him to transmit the price and costs of freight, &c., to the seller. This view of the case is quite inconsistent with the manager's evidence, that he refused to give the defendant credit

for the goods to be supplied and agreed to supply goods for cash before delivery, and that it was, in pursuance of that arrangement that the goods in question were sent and the mate's receipt sent by value-payable post.

It is, I think, clear from this evidence that the defendant was not to have delivery of the goods before they had been paid for.

The immediate question in the case is : In whom was the property in the goods when the steamer was wrecked ? If in the plaintiffs, had the risk nevertheless passed to the buyer ?

The law as to the time at which the property in the goods passes to the buyer is clearly laid down in the rules formulated in section 18 of the Sale of Goods Ordinance, 1896. The rules applicable to this case are rules 5 (1) and 5 (2). Rule 5 (1) lays down that " unless a contrary intention appears, where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." Rule 5 (2) lays down that " where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

The goods in question were, in pursuance of the contract, delivered to a carrier for transmission to the defendant and were therefore appropriated to the contract, and in accordance with rule 5 (1) the property in the goods would have passed to the buyer if the plaintiffs had not reserved a right of disposal. The plaintiffs had in my opinion. reserved that right by sending the mate's receipt to the buyer by value-payable post. The sending of the mate's receipt in that way made delivery conditional on payment, and the property in the goods did not pass to the buyer until that condition was fulfilled (section 19 (1)).

The respondent argued that the buyer had assumed the risk although the property in the goods had not passed to him and the case of *Stock v. Inglis*¹ was cited in support of the proposition that there might be an assumption of risk apart from the transfer of property. That case turned on the fact that the contract was an F.O.B. contract, and I cannot see its applicability to the present case where the risk of the carriage by sea was never within the contemplation of the parties and formed no part of the arrangement

¹ (1884) 12 Q. B. D. 564.

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between them for the sale and purchase of goods. The ordinary rule (section 20) that the risk remained with the seller must therefore apply.

I accordingly hold that neither the property in the goods nor the risk passed to the buyer, and that plaintiffs' action should be dismissed, with costs in both Courts.

Appeal allowed.

