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Present : Van Langenberg A.J.

CAPPER & SONS *v.* THE CARGO BOAT DESPATCH CO.

478—*C. R. Colombo*, 20,144.

Common carrier—Cargo consigned to plaintiffs landed by defendant—No contract between defendant and plaintiffs—Defendant liable to plaintiffs for damage done to cargo—Shipping.

Cargo consigned to the plaintiffs per ss. " Pagenturu " was landed by the defendant Company, who were common carriers.

Held, that the defendant Company was liable to the plaintiffs for damage caused to the cargo, though there was no contract between plaintiffs and the defendant Company.

THE facts are set out in the following judgment of the Commissioner of Requests (M. S. Pinto, Esq.) :—

Five bales of paper consigned to the plaintiffs were landed by the defendant from ss. " Pagenturu " of the Hansa line of steamers. One of the packages reached the warehouse in a damaged condition. The boards were off. The paper was quite unfit for printing purposes, for which it was indented. It was bent, cut up, and split ; some of the reams were loose and mixed up.

The plaintiffs claim as damages the value of the paper. The defendant denies his liability, on the grounds that he was under no obligation to the plaintiffs with regard to the paper under a contract or otherwise, and that on the receipt he gave to the ship he made the remark that one band of this bale was loose.

Assana Marikar v. Livera [1] was relied on by the defendant. But that case is clearly distinguishable from this. There was proof of a special contract between the carrier and the shipping agents ; there was no proof that the carrier was a common carrier ; the claim was in respect of a package which was lost after it reached the warehouse, and when it was no longer in the custody of carrier.

As remarked by Layard C.J. in the course of the argument in the case cited, the carrier is certainly responsible between the ship and the shore. The question is, to whom ? Surely not to the shipping agents, who have by clause 8 of the bill of lading divested themselves of all responsibility in respect of the goods after they have left the ship. No express contract with the shipping agents whereby the defendant bound himself to them for the safe delivery of the goods has been proved. It was hinted that there was a written agreement, but that agreement has not been produced ; nor has it been proved otherwise that there is any binding agreement with the agents. I am of the opinion that there is no valid agreement with the agents, whereby the carrier could be made responsible to them for the goods. There is no proof that any freight was due to the agents on this bale, or that the agents were in any way interested in its reaching the shore in good condition.

[1] *(1903) 7 N. L. R. 158.*

The defendant looked for payment to the Wharfage Company, who it has been proved, acted as the agents of the plaintiffs. He exercises, with the permission of the Collector of Customs, a lien over the goods conveyed by him on account of the charges payable to him. In view of these circumstances, and in the absence of contract, express or implied, with the shipping agents, I think that a contract with the plaintiffs can be implied. Even if a contract cannot be implied, the defendant, who, it has been proved, is a common carrier, is liable apart from contract (*Beven on Negligence, vol. II., p. 875*).

Moreover, as there is no proof that the shipping agents were in any way interested in this bale of paper after the defendant took charge of it, the defendant may be regarded as a carrier to whom the vendor's agent delivered the paper to be forwarded to the vendee. From this point of view the plaintiffs are the right persons to sue the defendant for the damage done to the paper (*Chitty on Contracts, 15th ed., p. 461*).

The defendant being a common carrier is an insurer of the goods he conveys, and is bound to deliver them in the same condition in which he received them (*Beven on Negligence, vol. II., p. 885*). When taking charge of this paper at the steamer he made a remark on the receipt that one band on the bale in question was loose. This receipt is for various packages, and is in the following terms :- " Received the under-mentioned goods in good order and condition (here occurs the description of the goods)." Against the description of this bale is the remark " One band loose." The only interpretation that can be put on this receipt is that the defendant found this bale in good condition and order, except that he found a band loose. Probably, owing to one of the bands being loose, the paper got damaged during the transport from the steamer to the shore. But the defendant was bound to see that no damage occurred while the bale was in his custody. The burden is shifted on to him to show that he delivered it in the condition in which he received it. This burden he has not discharged. In fact, he made no attempt to prove that no damage was caused while the package was in his custody. As the paper was in good condition when the defendant took it over, but was damaged on its way to the shore, the defendant is liable, although the damage was probably caused by one of the bands being loose. The defect in the packing was visible (*Beven on Negligence, vol. II., p. 885*).

As regards the fee paid to the surveyor, there was no agreement with the defendant that the losing party in this case was to pay it. The survey was made without the defendant's consent. If the survey report had been put in evidence, the fee may have been recoverable as costs in this case, but the report was not admissible in evidence, as the surveyor was not called as witness. When the plaintiff's counsel offered to produce it, it was objected to, and the objection was upheld.

Judgment for the plaintiffs as prayed, with costs, less the amount claimed as having been paid to the surveyor.

The defendant Company appealed.

Bawa (with him *E. W. Perera*), for the defendant, appellant.—There is no contract whatever between plaintiffs and defendant.

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The defendant was acting in pursuance of a contract with Volkart Brothers. (*Assana Marikar v. Livera*[1] is in point ; see also *Hudson v. Baxendale.*[2])

The plaintiffs ought to have proved that the damage was caused by defendant's negligence. (*Subraya v. B. I. S. N. Co.*[3]) There is no proof that any damage was caused between ship and shore. There is no proof as to the amount of damages plaintiffs have suffered. The law as to carriers is not the English Law. The point whether the defendant was a carrier was not raised at the trial.

Hayley, for the plaintiffs, respondents.—The point as to *quantum* of damages was not raised in the lower Court.

Ordinance No. 5 of 1852 has introduced the English Law in matters relating to carriage of goods by ships. The Roman-Dutch Law is the same as the English Law (3 *Maasdorp* 260).

There is an implied contract between the defendant and the plaintiffs. The defendant is, moreover, a common carrier. See *Addison on Contracts*, 10*th ed., p.* 942 ; and *Halsbury's Laws of England, art:* " *Common Carrier*".

The carrier is liable for damages to the consignee, and not to the consignor. The shipowner is not liable after the cargo leaves the ship's side. They are protected by the bill of lading. But if the shipowner gives the paper to an agent or nominee of theirs, are the agents not liable if they cause damage ?

Bawa, in reply.—Ordinance No. 5 of 1852 does not introduce the English Law as to these matters. Small boats are not ships. Ordinance No. 22 of 1866 introduces the English Law as to carriers by land only. Under the Roman-Dutch Law there must be proof of negligence to make the carrier liable. See 2 *Nathan, pp.* 999, 1002.

Counsel also cited *Encyclopaedia of the Laws of England, article on Common Carrier.*

Cur. adv. vult.

After argument Van Langenberg A.J. referred counsel to *Symons v. The Wharf and Warehouse Company, Ltd.*[4]

Cur. adv. vult.

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The plaintiffs in their plaint set out that they are the proprietors of a newspaper known as *The Times of Ceylon*, and that the defendant carried on business in Colombo as the " Cargo Boat Despatch Company " ; that on or about June 11, 1910, the defendant, at the request of the plaintiffs, conveyed from the steamer known as the " Pagenturu ", to the wharf five packages of paper, one of which

[1] *(1903) 7 N. L. R. 158.*
[2] *(1859) 2 H. & N. 575.*
[3] *(1905) 3 Bal. 40.*
[4] *(1878) 1 S. C. C. 92.*

was delivered at the wharf in a damaged state, and the plaintiffs claimed Rs. 63 as damages. The defendant denied having any contract with the plaintiffs, and pleaded as follows :—

(4) For a further answer the defendant says that he has obtained from Messrs. Volkart Brothers the exclusive privilege of landing goods from Hansa line of steamers, and that in the exercise of the said privilege he landed from the ss. " Pagenturu " a package of paper which was in bad order when he took delivery, one of the two hoops by which the planks on either side of the package were kept in position being loose, and the said package was in due course delivered to the " bad order " warehouse

The following issues were framed :

(1) Was there a valid contract between the plaintiff and the defendant on which the defendant is liable to be sued ?
(2) If not, is the defendant nevertheless liable ?
(3) Did defendant decline to deliver the bale of paper in the same condition in which he received it ?
(4) Even if not, is the defendant liable ?
(5) What damages, if any ?

After trial the learned Commissioner held that a contract between the plaintiffs and the defendant can be implied, and that, apart from contract, the defendant, who had been proved to be a common carrier, is liable, and having found that the damage was caused while the goods were in the defendant's custody, he entered judgment for the plaintiffs. Mr. Bawa argued that there was no suggestion in the plaint that the defendant was a common carrier, nor did the issue specifically suggest this, or raise the question of the defendant's liability as a carrier. He contended that the action was one purely for breach of contract, and that the plaintiffs had failed to prove any contract. In my opinion no contract has been proved in this case. The facts are very nearly similar to those in *Symons v. The Wharf and Warehouse Company, Ltd.*,[1] and I rely on that case in arriving at my decision. The question then remains whether the liability of the defendant as a carrier can be considered. Mr. Bawa submitted that it was not until both sides had led evidence that Mr. Hayley, who appeared for the plaintiffs, raised this question, and that the defendant had no opportunity of putting forward his defence to a claim of this kind. If I thought that the defendant had contested the plaintiffs' claim only as a claim on a contract, I would set aside the judgment and order a new trial, but it seems to me that the parties undertook to put all the facts which they considered relevant and material before the Commissioner, and asked him to determine on those facts whether the defendant was

[1] *(1878) 1 S. C. C. 92.*

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liable. The second issue would have no meaning unless I am correct. Further, objection does not seem to have been taken to Mr. Hayley putting forward the alternative claim. On the contrary, the Commissioner records that it was contended for the defendant that he was not liable on contract or otherwise. It seems to me that the plaintiffs have proved that the defendant is a common carrier, that he received the goods in good order and condition (*vide* the receipt granted to the ship), and that the goods were damaged in transit between ship and shore, the evidence being that the package in question was at once put into the "bad order" warehouse by the defendant. The remark on the receipt that one band was loose does not alter the position. I think, therefore, that the defendant's liability as a carrier has been established. There was no evidence led on the issue relating to damages, but I understand from Mr. Hayley that the amount was not seriously questioned, and in the petition of appeal no reference is made to this matter.

I dismiss the appeal with costs.

Appeal dismissed.