1959 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

S. A. L. ABDUL LATIFF *et al.*, Appellants, *and* CEYLON WHARFAGE CO., LTD., Respondent

S. C. 625—D. C. Colombo, 38,884/M

Carrier by water—Liability for loss of goods received by him—Vis major—*Inevitable accident.*

Plaintiff sued the defendant Company for the recovery of damages for the non-delivery of a portion of the bags of cement belonging to the plaintiff which the defendant had undertaken to unload from a ship. The non-delivery was caused by the sinking of a barge of the defendant while it was carrying the goods in question. The evidence showed that " the barge, lowered with the tide, settled on pinnacles of rock, which pierced the bottom " and that the damage to the bottom of the barge was due to its " settling on or striking some submerged rock or something at the bottom of the harbour ". There was also evidence that there was unusual blowing and swell but not to an exceptional degree.

Held, that, on the evidence, neither *vis major* nor inevitable accident could be pleaded in defence.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *V. A. Kandiah* and *N. R. M. Daluwatte*, for the plaintiffs-appellants.

Edmund J. Cooray, with *E. B. Vannitamby* and *Hanan Ismail*, for the defendant-respondent.

Cur. adv. vult.

May 29, 1959. SANSONI, J.—

A consignment of 10,161 bags of cement ordered by the plaintiffs arrived in Colombo harbour on s.s. Kaiyo Maru on 23rd October 1955. The Port authorities entrusted the task of landing the goods brought by that ship to the defendant. It is not in dispute now that 500 bags which were received by the defendant at the ship's side were not delivered to the plaintiffs, who accordingly brought this action to recover a sum of Rs. 4,250 at the rate of Rs. 8/50 per bag.

The evidence shows that the 500 bags in question were unloaded from the ship into a barge W195 belonging to the defendant on 2nd November and this barge was brought, along with two other barges belonging to the defendant, to the jetty at Hangar warehouse. The goods in the other two barges were unloaded by about 8 or 8·30 p.m., and barge W 195 was then brought alongside the jetty and landing commenced. After 120 bags of cement out of a total of 1,280 bags which were in the barge had been unloaded, it started to rain and unloading ceased for the night.

On the morning of 3rd November, at about 8·30 or 9 a.m., the lighterman Punchi Singho opened the hatches and found that there was a good deal of water in the barge. An alarm was raised and efforts were made to pump out the water but the barge sank in a short time. It was raised

2——J. N. B 18300—1,995 (11/59).

out of the water on 18th November, and inspected on 21st November by Mr. Rees who was called in by the defendant to examine its condition and to report on the cause of its sinking. His findings appear in the report furnished by him on 24th November.

Mr. Rees is a Chartered Marine Engineer and a ship surveyor. He has had experience of the waters of Ceylon since 1939, and during that period he has inspected barges and craft plying in the harbour. His evidence has not been challenged, and his opinion given both in evidence and in his report, as to the cause of the sinking, seems to me to be decisive. To quote from his report : " The barge sank between 9 and 9·15 a.m. on 3rd November about one hour before low water. Even when sunk one gunwale was showing above water level. From my inspection of the barge and the preceding remarks, the obvious and only conclusion is that the barge, lowered with the tide, settled on pinnacles of rock, which pierced the bottom ". In giving evidence Mr. Rees said that from the moment the barge received that damage it would have taken 20 to 30 minutes to founder, and in his opinion the damage he found on the bottom of the barge was due to its " settling on or striking some submerged rock or something at the bottom of the harbour ". As the report also makes it clear that apart from this damage the barge was in very good condition, unseaworthiness was ruled out as a cause of the barge sinking.

The defence put forward to the plaintiffs' claim appears in paragraphs 4 (*c*) and (*d*) and 5 (*a*) of the answer. The defendant there pleaded that as a result of strong wind and heavy swell the bottom of the barge struck a submerged object and sank in spite of every care and precaution taken by the defendant, and in spite of every effort to keep it afloat, and without any negligence on the part of the defendant. The defendant pleaded inevitable accident, Act of God, *damnum fatale* and *vis major* as the cause of the sinking. It is to be noted that in the answer there is no reference to the barge having lowered with the tide, although this was the direct cause of the damage according to Mr. Rees. Issues were framed in accordance with the averments in the answer to which I have referred, and there is no mention in them of the tide. In the view I take of the evidence regarding wind and swell the omission becomes important.

The learned District Judge dismissed the plaintiffs' action on the ground that the cause of the sinking of the barge could not have been anticipated or prevented by the defendant, because it struck against some object at the bottom of the sea when it was being rocked about on account of the swell.

I might here set out a very brief outline of the nature of the action and the rights and liabilities of the parties. The Prætors' Edict is the basis of our common law in regard to an action of this nature. It ran : " Unless carriers by water, innkeepers, and stable-keepers restore what they have received from anyone to take care of, I will give judgment against them ". (Dig. 4.9.1) In dealing with the praetorian action *quasi ex contractu* Voet says : " It lies for their making good all damage which has been sustained in whatever manner to the property received by theft, spoiling or otherwise, with the exception only of what clearly appears to have perished by inevitable loss or *vis major*, as by shipwreck

or outrage of pirates". (Voet 4.9.2—Gane's translation). The comment of Vanderlinden on this passage is : "But the opinion appears to have been correctly given that inevitable loss and *vis major* excuse the receiver only in the case where he can clearly show that the disaster was such as neither he nor his people could have forfended, whatever the degree of diligence they had employed. Examples of that sort are found in fires arising from lightning or from neighbouring houses, in shipwreck and the violence of robbers" (Gane's translation Vol. 1 page 767).

They are made insurers of the goods. They are bound absolutely, although the goods perished or were damaged without any default on their part—see *Davis v. Lockstone* [1]. The opinion expressed by Gratiaen J. in *Alibhoy v. Ceylon Wharfage Co., Ltd.* [2] that a carrier by trade is not an insurer of the goods entrusted to him for carriage is contrary to the view of Lee—An Introduction to Roman-Dutch Law (5th edition) page 317, and McKerron—The Law of Delict (5th edition) page 96.

Now the defendant's case at the trial was that on the morning of 3rd November there was strong wind and heavy swell, and it was sought to attribute the damage to the barge to the weather conditions prevailing at the time. But I think the best evidence on the question of the strength of the wind has been given by the Assistant Meteorologist, Mr. Seneviratne, who has spoken to the speed of the wind from 1 a.m. on 2nd November to 6.30 p.m. on 3rd November, as recorded on the anemograph at the Pilot Station. Although the wind reached a maximum speed of 37·5 m.p.h. at 4 p.m. on 2nd November the speed was less than 10 m.p.h. from 8 a.m. to 11.45 a.m. on 3rd November. It is therefore not possible to accept the evidence of any witness who has stated that there was strong wind at the time the barge sank.

Then with regard to the question whether there was a heavy swell, the lighterman Punchi Singho stated that there was heavy blowing and swell on the morning in question and so did Serang Sebastian Pitchai. Mr. Jansz, an Assistant Superintendent employed by the defendant, said that there was unusual swell that day. Even if one were to accept all this evidence with regard to the swell, the question arises whether the swell was of such a nature as to bring it within the defence of *vis major*. I derive assistance on this point from the case of *New Heriot Gold Mining Company Ltd. v. Union Government* [3] where it was held that *vis major* or *casus fortuitus* includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against, and that a defence of *vis major* should not be upheld save on the clearest evidence. It was incumbent on the defendant to establish that the swell on the morning in question was of an extraordinary and well-nigh unprecedented kind. Even if the evidence of the eye-witnesses is accepted on this point, and we have been warned that some allowance must be made in cases of this kind for exuberance of language, it goes no further than proving that the swell was heavy but not to an exceptional degree.

Since the evidence regarding wind and swell fell short of establishing a case of *vis major*, it seems to me that the defendant failed to discharge the burden that lay upon it upon the issues suggested at the trial. But

[1] *(1921) A. D. 153.* [2] *(1955) 56 N. L. R. 475.*
[3] *(1916) A. D. 415.*

the defence based on wind and swell was entirely unsupported by the report and evidence of Mr. Rees and his explanation as to why the barge suffered damage to its bottom. The direct cause, according to him, was the lowering of the barge with the tide, and not a rocking about in a swell. The defendant cannot disclaim the evidence given by its own expert, and I think this case must be decided on the basis that the barge was moored at a spot where it would lower when the tide went out and settle on some submerged object. I think the learned Judge has overlooked this all-important aspect of the case. But let me consider the case as if the issues covered the question of the barge lowering with the tide and thus settling on a submerged object. This would seem to raise a defence of *damnum fatale* or inevitable accident.

Now an accident is inevitable if it is one which cannot be avoided by the exercise of ordinary care and caution. But if it results from a danger which ought to have been foreseen and could have been guarded against, it is not an inevitable accident. These are the views expressed in *The Merchant Prince* [1]. What evidence is there in this case that the slightest precaution was taken against this heavily loaded barge striking a submerged object in low water ? I can find nothing in the record to show that such an eventuality was ever considered by the defendant or its servants. It does not appear that any effort has been made even since this accident to ascertain what this submerged object was or how it came to be there. Mr. Rees was asked in cross-examination whether he had any idea of the depth of the water around this jetty and the other small jetties near the warehouses, but he said he did not know. He said that there was a chart of the Colombo harbour, but he did not know if it gave the depth near any of these jetties. No chart has been produced in evidence, so we do not know what information such a chart contains.

Having regard to the nature of the duty imposed on the defendant, which is to use the greatest diligence and to prove that every care had been taken by it of the articles entrusted to its custody, and that their loss was purely fortuitous, it was surely the defendant's duty to prove that it made every effort to ensure that its barges plied only in such parts of the harbour as were considered safe. If it relies on ignorance of the presence of any rocks or other submerged objects which might at low tide endanger a barge that is tied up by a jetty, it must show that such ignorance was not due to absence of due enquiry. There is a total absence of evidence on any of these matters. That may be due to the nature of the defence put forward, for as I have pointed out no notice seems to have been taken of the very significant part played by the tide in this accident.

Mr. Cooray urged that the defendant was bound to obey the orders of the Port authorities in regard to the particular jetty at which the goods were to be discharged. But this is another matter altogether. It was the duty of the defendant to make sure, before it obeyed such orders, that it was reasonably safe to tie up its barges at the particular jetty, and to draw the attention of the Port authorities to any dangers that may attend obedience to those orders. It has failed to perform this duty. Mr. Cooray also submitted that barges laden with goods had been tied up at this jetty for many years and had suffered no damage. But there

[1] *(1892) P. 179.*

was no evidence that barges carrying goods of the weight carried by this barge at the relevant time had been tied up there at low tide and gone unscathed, for only then could it be presumed that the submerged object got there recently and unexpectedly.

The defendants have therefore failed in any view of the matter to show that this case fell within either of the exceptions *vis major* and *damnum fatale*. With regard to the quantum of damages, although the plaintiffs wrote to the defendant claiming a sum of Rs. 3,795 as value plus duty and dues and landing charges, the value here is the invoice value. But the evidence of the plaintiffs' manager, which has not been contradicted and is supported by documents produced by him, shows that the market price of a bag at the relevant time was as high as Rs. 9·25. It cannot be said that the claim of Rs. 8·50 per bag is excessive.

I would therefore allow this appeal and give judgment for the plaintiffs as prayed for with costs in both Courts.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.