1967 *Present :* **Manicavasagar, J., and Samerawickrame, J.**

MAURICE ROCHE LTD., Appellant, *and* PORT (CARGO) CORPORATION, COLOMBO, Respondent

S. C. 605/65—D. C. Colombo, 57571/M

Port (Cargo) Corporation—Its legal position as carrier by trade—Scope of its liability to a consignee of goods—Port (Cargo) Corporation Act No. 13 of 1958, ss. 4 (1), 26, 63 (3) to (6), 65 (1) (b), 75, 79—Customs Ordinance (Cap. 235), s. 40.

Where goods belonging to a consignee are damaged by the Port (Cargo) Corporation in the course of being conveyed from ship to shore, the legal relationship of the Corporation to the consignee is that of a carrier by trade in respect of an implied or tacit contract for the carrying of the goods from the vessel to the shore. Accordingly, the Corporation is liable, except in case of *vis major* or *damnum fatale*, to compensate the consignee for the damage caused to the goods. In such a case, it is unnecessary to consider whether there was negligence on the part of the Corporation.

Quaere, whether section 75 (1) (*a*) of the Port (Cargo) Corporation Act which provides that " no suit or prosecution shall lie against the Corporation for any act which in good faith is done or purports to be done by the Corporation under this Act " is applicable in respect of a claim based on negligence.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, Q.C., with *K. N. Choksy*, *A. Perera* and *Miss N. Naganathan*, for the plaintiff-appellant.

E. B. Wikramanayake, Q.C., with *K. Thevarajah* and *E. P. P. Perera*, for the defendant-respondent.

Cur. adv. vult.

December 14, 1967. MANICAVASAGAR, J.—

I am in complete agreement with the conclusion reached by my brother, Samerawickrame, but I desire to refer in a general way to the legal relationship between the Port Cargo Corporation and the consignee of goods under the Act of 1958.

The Act has done away with the landing agencies which were engaged in the Port of Colombo in transporting goods between ship and shore, and cast a general duty on the Corporation to provide efficient and regular services, referred to as " Port Services ", for stevedoring, landing, and warehousing cargo....and any other services incidental thereto (Section 4 (1) (*a*)). The Act further provided for the levy of charges for services rendered by the Corporation (Section 4 (1) (*b*), prescribed the time when such charges should be paid (Section 63 (3) to (6)), and made provision for the sale of such goods if the charges are not paid, and the goods not removed by the owner (Section 65 (1) (*b*)). These rights and duties which are almost similar to those which carriers by trade had prior to the Corporation taking over the port services, are in my view sufficient to constitute the Corporation a carrier by trade : the legal relationship between the Corporation as a carrier by trade, and the consignee has not been affected by the Act, except where it has been limited by certain provisions in the statute.

In *Alibhoy's case* [1], which was decided before the Act, Gratiaen J. observed that the origin of a carrier's obligation towards a consignee was traceable either to the express or implied term of the contract, though in the particular case he found difficulty in inferring an implied contract between the carrier and the consignee. The question whether a contract can be implied is one of fact, and in my view the Corporation, having regard to its duties and rights, must be deemed to transport goods from ship to shore for the benefit of the owner (the consignee) on the basis of an implied contract. The liability of the Corporation must therefore be determined by the principles of Roman-Dutch Law applicable to carriers by trade, unless it is protected by the Act. The Corporation like any other carrier is under an absolute duty to make good all loss or damage unless it can be shown that this was due to *damnum*

[1] *(1954) 56 N. L. R. 470, at page 476.*

fatale or *vis major*, the burden of proving this being on the carrier. None of these defences has been established by the evidence. It only remains to consider whether Section 75 and/or 79 prior to the amendment protects the Corporation from liability : the latter has no relevance to the facts of this case. Section 75 protects the Corporation from any action for any act done in good faith by the Corporation : but this provision, I have no doubt, applies to obligations arising *ex delicto*, and not to contractual or quasi-contractual obligations. In any event when an act is claimed to have been done in good faith, I lean to the view that it must be shown to have been done with due care and attention : the Act provides for efficient and regular port services, and if an act is done inefficiently or negligently the plea of good faith must fail.

SAMERAWICKRAME, J.—

This is an appeal from the dismissal of an action brought by the plaintiff-appellant for the recovery of a sum of Rs. 26,151·92 from the defendant-respondent. The claim was in respect of damage caused to goods contained in 61 packages consigned to the plaintiff-appellant by the s.s. " Birkenfels " when the said packages were in a lighter owned and operated by the defendant-respondent in the course of being conveyed from the vessel to shore.

The plaintiff-appellant made his claim on three alternative grounds. They were :—

(*a*) that the damage caused was due to the negligence of the defendant-respondent and/or its servants or agents.

(*b*) the goods had been received by the defendant-respondent in good order and condition in the capacity of a common carrier or a carrier by trade and when the defendant parted with the custody of the 61 packages, they were in a damaged condition.

(*c*) the defendant-respondent took custody of the said goods in good order and condition in pursuance of a contract for fee or reward and when the defendant-respondent parted with the custody of the 61 packages they were in a damaged condition.

The defendant-respondent denied that it had been negligent and further averred that they carried the goods under a statutory duty imposed on them and that even if they were negligent they were exempt from liability by virtue of the provisions of Section 75 of the Port (Cargo) Corporation Act No. 13 of 1958.

The relevant provisions of Section 75 are as follows :—

" (1) No suit or prosecution shall lie—

(*a*) against the Corporation for any act which in good faith is done or purports to be done by the Corporation under this Act ;"

Mr. C. Ranganathan, Q.C. submitted that the section afforded a defence only in respect of a claim made on a delictual liability. In *Subbiah v. The Town Council of Point Pedro*[1], statutory provisions similar to this section have been interpreted to apply only in respect of a wrongful or delictual act and not to apply to a failure to carry out a contract—*vide Subbiah v. The Town Council of Point Pedro*[1], and the authorities referred to in the judgment in that case. I am of the view that Section 75 affords a defence, if it is applicable, only to the first ground set out by the plaintiff-appellant. Mr. Ranganathan further argued that the requirement of " good faith " in the section implied the presence of due care. Though there are authorities that support this position, there are others that take the view that good faith has no relation to the manner in which a thing is done but refers to a state of mind. After careful consideration, I am not satisfied that the finding of the learned District Judge that the defendant-respondent acted in good faith is wrong. Accordingly, the defendant-respondent has a good defence exempting it from liability in respect of the claim based on negligence.

It is, therefore, necessary to decide whether the plaintiff-appellant has established either the second or third ground relied on by them.

Mr. E. B. Wikramanayake, Q.C., appearing for the defendant-respondent, contended that the plaintiff appellant had failed to place any evidence before the Court that the defendant Corporation was a common carrier and that the true position was that the defendant performed statutory duties in transporting goods from ship to shore. Section 4 (1) of the Port (Cargo) Corporation Act No. 13 of 1958 provides :—

" It shall be the general duty of the Corporation—

(*a*) to provide in the Port of Colombo and in any other port that may be determined by the Minister by Order published in the *Gazette* efficient and regular services (hereinafter 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 ; and

(*b*) subject to the provisions of sub-section (2), to conduct the business of the Corporation in such manner, and to make in accordance with the provisions of this Act such charges for services rendered by the Corporation, as will secure that the revenue of the Corporation is not less than sufficient for meeting the charges which are proper to be made to the revenue of the Corporation, and for establishing and maintaining an adequate general reserve. "

[1] *(1956) 58 N. L. R. 477.*

By virtue of an order made in terms of Section 26 of the Act, the services referred to in Section 4 (1) were at the relevant date performed exclusively by defendant Corporation. It is, therefore, contended that there was a statutory duty on the defendant to convey all goods consigned to any person in the Island that were on board a ship that came into the port of Colombo from the ship to shore. I am unable to agree with this contention. Section 4 (1) requires the defendant to provide efficient and regular services *inter alia* for landing goods. Such services had to be availed of by parties who desired goods to be landed. Consignees may themselves not make any prior request to the Corporation to land their goods but such a request may be made by the Master of the ship or the Ships' Agent either on behalf of the consignee or otherwise. It must be borne in mind that Section 4 (1) was operative at a time when the defendant Corporation did not exclusively perform their service and when Port entrepreneurs were still permitted to operate. I am, therefore, of the view that the statutory duty on the defendant was not the actual landing of the goods but the providing of services for landing goods.

The next matter for decision is whether the plaintiff-appellant has led evidence to show that the defendant Corporation was a common carrier. The Port (Cargo) Corporation Act No. 13 of 1958 itself cast on it the duty of providing services for landing goods. If it carried out the duties cast on it by the statute, it necessarily held itself out as willing to carry goods for any person provided it was paid the proper charges. It may be presumed that it did carry out the duties imposed on it by law. Apart from that, the position taken up by it in its answer was that it carried the goods in pursuance of a statutory duty. It appears to have been common ground that the Corporation carried goods for all persons and the only difference between the parties being whether it did so in pursuance of a statutory duty or of a contract, express or implicit. I, therefore, hold that it has been proved that the defendant-respondent was a common carrier and/or carrier by trade.

It is necessary to consider whether there was a contract either express, implied or tacit, between the plaintiff-appellant and the defendant-respondent to carry the goods of the former from ship to shore. There is no evidence of any written or express agreement. I think, however, that when the Master of the ship discharged the goods into the lighter of the defendant-respondent, there was a request that the defendant-respondent should carry the said goods from ship to shore and an implied promise to pay the charges. If it is necessary to analyse the agreement and to reduce it to offer and acceptance, I think that there was a continuing offer by the defendant-respondent to carry the goods of any and all persons who required their services for the conveyance of goods from ship to shore. When goods were discharged by the Master of the vessel into a lighter of the defendant-respondent, there was acceptance of that offer and consequently an implied or tacit contract. The question,

however, remains whether the contract was made by the Master on behalf of the carrier, that is the owner or charterer of the ship or the consignor of the goods or the consignee, namely, the plaintiff-appellant. The title to the goods at that time was in the consignee, the plaintiff-appellant, and prima facie, therefore, one would think that the contract was made on his behalf. Further, Section 40 of the Customs Ordinance (Chapter 235) states as follows :—

" The unshipping, carrying, and landing of all goods, and the bringing of the same to the proper place for examination or for weighing, and the putting of the same into and out of the scales, and the measuring, counting, unpacking, and repacking, and the opening and closing of the same, and removing to and placing them in the proper place of deposit shall be performed by and at the expense and risk of the importer, consignee, or agent ". In terms of this provision, the landing of goods had to be performed by and at the expense and risk of the plaintiff-appellant. If the plaintiff-appellant employed a carrier to do the landing, the liability as between the plaintiff-appellant and the carrier would be, in terms of the contract, between them. The fact that the duty of landing goods in terms of the law was on the plaintiff-appellant also supports the position that the contract with the defendant-respondent in respect of the conveyance of the goods from ship to shore was made on behalf of the plaintiff-appellant.

Again, the Bill of Lading, P 1, contains in clauses 7 and 8 of the conditions of carriage, provision that any lightering in or at ports of loading or ports of discharge were to be for the account of the merchant and that loading, discharging and delivery of the cargo should be arranged by the carrier's agents, unless otherwise agreed and the loading, storing and delivery should be for the merchant's account. The term 'merchant' has been defined in the Bill of Lading to include the shipper, the receiver, the consignee, the holder of the Bill of Lading and the owner of the cargo. In clauses 7 and 8 of the conditions of carriage, the term 'merchant' is obviously used with the meaning consignee or owner of the goods. I, therefore, hold that there was an implied or tacit contract between the plaintiff-appellant and the defendant-respondent for the carrying of the goods from the vessel to the shore.

The liability of a common carrier or a carrier by trade, whether under the English law or under our Common Law, is similar. As such carrier, the defendant-respondent was under the obligation of delivering the goods to the plaintiff-appellant in the same condition in which he received them, unless he was able to show that damage had been caused to the goods by *vis major* or *damnum fatale*.—*vide Davis v. Lockstone*.[1]. There is no evidence of any unusual weather conditions or other circumstances which amounted to *vis major*. " Damnum fatale " means loss by accident which could not possibly have been foreseen and/or guarded against.

[1] *1921 A. D. 153.*

It cannot be said that the injury to the lighter, which resulted in damage to the goods, could not have been guarded against. Indeed, there is substance in the contention put forward by Mr. Ranganathan that though it was the duty of the Port Commission to keep the quay and its fenders in good order, there was a duty on the defendant-respondent to have taken care that its lighters should only be moored where it was safe to do so. It is unnecessary to consider the question whether there was a failure of the defendant to take such care which amounted, in the circumstances of this case, to negligence. It is sufficient to state that the damage to the goods was by no means damage which could not have been avoided had due precautions been taken. I, accordingly, hold that the defendant-respondent is liable to compensate the plaintiff-appellant for the damage caused to the goods of the plaintiff-appellant.

It is necessary, at this stage, to deal with a point taken by Mr. Wikramanayake. He submitted that the plaintiff-appellant had failed to raise an issue whether the defendant-respondent was a common carrier. Paragraph 3 of the plaint alleged both cumulatively and in the alternative, that the defendant-respondent were clearing, shipping and landing agents, warehousemen, common carriers, carriers by trade, bailees, and depositories. Issue 1 was framed with reference to paragraph 3 of the plaint. Nevertheless, the parties appear to have fought the case on the footing that the plaintiff's allegation was that the defendant was a common carrier and/or took custody of the goods on a contract for fee or reward. The learned District Judge so set out the position in the opening paragraph of his judgment. Where a party's position has been put fully before the Court and has been understood by the opposing party and the Court, it does not follow that "if sufficient facts have been proved entitling the appellant to succeed in a claim to be indemnified, he must be denied justice merely because his pleader has overstated his client's case and the Judge framed an issue embodying that overstatement."—*vide* Gratiaen J. in reliance of a dictum by Lord Atkinson in 54 N. L. R. at page 59.

The learned District Judge has not answered the issue in regard to damages because it was not necessary for him to do so in view of his answers to the previous issues. The case must, therefore, now be sent back to the trial Court in order that the quantum of damage may be assessed. The trial Court may allow the parties to lead evidence on this matter and thereafter assess the amount payable to the plaintiff-appellant.

We, accordingly, allow the appeal of the plaintiff-appellant and set aside the judgment of the learned District Judge. We further hold that the plaintiff-appellant is entitled to payment of damages by the defendant-respondent and we send the case back for assessment of the quantum of the said damages. The plaintiff-appellant is awarded costs of appeal and of the proceedings already had in the trial Court.

Appeal allowed