1948 *Present*: **Jayetileke and Basnayake JJ.**

BAGSOOBHOY, Appellant, *and* THE CEYLON WHARFAGE CO., LTD., Respondent.

S. C. 333—D. C. Colombo, 15, 431

Common carrier—Failure to deliver goods—Carriage by barge or lighter—English or Roman Dutch Law—Carrier by trade—Liability in damages—Defences available—Civil Law Ordinance (Chapter 66).

A barge or lighter is not a ship within the meaning of the Civil Law Ordinance, and the law relating to the carriage of goods by barge or lighter is the Roman Dutch law.

Under the Roman Dutch Law a carrier by trade is not bound to carry for anyone who demands his services. Under both English and Roman Dutch law a carrier is liable, upon proof of the receipt of the goods by him and their loss or non-delivery to the consignee, unless he can bring himself within the exceptions, the burden of proof being on him.

Assena Marikar v. Livera (1903) 7 N. L. R. 158 distinguished.

APPEAL from a judgment of the District Judge, Colombo.

F. A. Hayley, K.C., with *V. A. Kandiah*, for the plaintiff, appellant.—The District Judge has held that the defendant company is a common carrier. But he further held that there was no contract between the plaintiff and the defendant and also that all the bags received for carriage by the defendant had been landed at the Government warehouses. The judge therefore felt that he was bound by the decision in *Assena Marikar v. Livera*[1] and accordingly dismissed the plaintiff's action. The finding by the Judge that the defendant is a common carrier is correct. But his findings that there was no contract between the plaintiff and the defendant and that the defendant had landed and delivered at the Government warehouses all the bags received by him from the ship are clearly wrong and can be demonstrated to be wrong. The evidence available proves conclusively that all the bags consigned were put into defendant's barges or lighters from the ship, but there is no evidence that all the bags were landed at the warehouses. The evidence rather shows that there was a shortage in landing amounting to considerably more than the 219 bags which are the subject of this action.

The law applicable in this case seems to be the English Law. See Carriage of Goods by Sea Ordinance (Cap. 71), but on this matter Roman Dutch Law seems to be the same as the English Law. See *1 Halsbury p. 545* and *3 Maasdorp pp. 278 and 279 (2nd ed.)*.

In regard to the question whether there was a contract between the plaintiff and the defendant, on the evidence it is quite clear there is a contract. In the circumstances of this case the consignee is the proper person to sue. See *4 Halsbury p. 95*; Roscoe's *Digest of the Law of Evidence 696 (18th ed.)*; *Proprietors of Cork Distillery Co. v. Directors of the Great Western and Southern Railway Co. (Ireland)*[2].

[1] *(1903) 7 N. L. R. 158.* [2] *L. R. (1874) 7 H. L. 269 at 277.*

The defendant is liable as carrier or warehouseman or as both. The judge finds he is a common carrier. There is ample evidence on the point. A common carrier is an insurer of goods delivered to him and can escape liability only by proving that loss was due to act of God, King's enemies, &c. A common carrier is liable without proof of negligence on his part. As to who are common carriers and their liabilities see *4 Halsbury pp. 2 and 3.*

See also *Thomas & Co. v. Brown*[1] ; *Liver Alkali Company v. Johnson*[2] ; *Hill v. Scott*[3].

As a warehouseman the defendant is a bailee and therefore the burden was on the defendant either to deliver the goods or to explain what happened to them. See *1 Halsbury p. 545.* The defendant is liable in tort too as he has taken the plaintiff's goods with or without plaintiff's consent and either lost them or failed to deliver them to the plaintiff through negligence.

The decision in *Assena Marikar v. Livera* (*supra*) has no application to the facts in this case. Here there is no evidence that all the bags were delivered at the warehouses. In that case there was no proof that the defendant was a common carrier. In this case it was never the defence of the defendant that the goods were lost at the warehouse. Further the defendant has previously acknowledged his liability for shortages and has paid for such losses. The defendant's attempt to escape liability by reason of the circular issued by him must clearly fail.

H. V. Perera, K.C., with *Ivor Misso*, for the defendant, respondent.—The District Judge has held that the defendant was a common carrier and was absolutely liable to make good the losses occurring during carriage even by theft, &c., but as the defendant has delivered at the warehouses all the bags he received from the ship the defendant's liability ended, on the authority of the decision in *Assena Marikar v. Livera* (*supra*).

The finding that the defendant is a common carrier is clearly wrong. The Judge has not rejected the evidence of Mr. Galbraith and this is conclusive on the matter that the defendant is not a common carrier. The burden is on the plaintiff to prove that the defendant is a common carrier as, under the Boats Ordinance, all boatmen are not common carriers. That burden has not been discharged. Carrying on a public employment as a carrier is a necessary condition of a common carrier but is not a sufficient condition of a common carrier. A person must undertake to carry goods for all to be a common carrier. If a carrier has a right to refuse he is not a common carrier. See *Nugent v. Smith*[4] ; Belfast *Ropework Co. Ltd. v. Bushell*[5].

If the defendant is not a common carrier he is only liable if there was negligence. Negligence has not been proved nor has it been put in issue. Misconduct or negligence may be inferred from non-delivery in ordinary circumstances but in the extraordinary circumstances such as were prevalent at the relevant time such a presumption is not justifiable.

[1] *(1899) 4 Times Report of Com. Cases 186 at 189.*
[2] *L. R. (1872) 7 Exchequer 267.*
[3] *L. R. (1895) 2 Q. B. D. 371 at 375 and 376.*
[4] *L. R. (1875) 6 C. P. D. 19 at 26, 423, 433.*
[5] *(1918) 1 K. B. 210 at 214.*

Even for such a presumption to arise the issue must first be raised. No issue as to misconduct or negligence was raised. Therefore no presumption of misconduct or negligence can arise. The circular notice showed the *bona fides* of the defendant. On the evidence it is quite clear that all goods taken from the ship were delivered at the warehouses. Therefore the defendant is not liable.

F. A. Hayley, K. C., in reply.—The test of common carrier in *Nugent v. Smith* (*supra*) is a dictum which never became law as all the text book writers, even after its decision, do not follow that dictum.

Cur. adv. vult.

March 4, 1948. BASNAYAKE J.—

Krimbhoy Bagsoobhoy the plaintiff appellant (hereinafter referred to as the appellant) is a merchant and Commission Agent carrying on business in Colombo for over thirty years. For the purpose of his business he imports goods chiefly foodstuffs from abroad. The Ceylon Wharfage Co., Ltd., the defendant respondent (hereinafter referred to as the respondent company), is a company incorporated in England having its registered office in London and carrying on an extensive business at Colombo as clearing, landing and shipping agents, warehousemen and stevedores.

About May 30, 1942, a consignment of 743 bags of foodstuffs consigned to the appellant by one V.V. Shanmuga Nadar & Bros. arrived in Colombo harbour by the S. S. Ninghai a steamship owned by the British India Steam Navigation Company whose agents at Colombo are Mackinnon Mackenzie & Co., Ltd. The appellant became the assignee of another consignment of 500 bags of foodstuffs consigned by the same steamer to one S. Subramaniam Pillai by one S. V. Sadachalam Pillai of Tuticorin.

On the arrival of the S.S. Ninghai the respondent company obtained delivery of the appellant's goods at the ship's side on production of the relative bills of lading and gave the shipowner a full receipt therefor. Thereafter the respondent company conveyed the goods in its own lighters in charge of its servants and landed and placed them in two King's warehouses known as F2 warehouse and Delft warehouse whence they, save and except the goods in regard to which this action has been brought, were in due course upon payment of its charges placed by the servants of the respondent company in carts provided by the appellant for conveyance to his place of business.

For the due and proper performance of its duties the respondent company maintains a large organization. It has its own tally clerks who go on board the ship and receive the goods on behalf of its customers, its own lighters and lightermen, its own warehouse superintendents, storekeepers and tally clerks in each of the King's warehouses together with a staff of day watchers, stitchers and labourers for unloading, stacking in the warehouses and delivering the goods to carts or other vehicles for conveyance to the business premises of the respective consignees. For its services it charged a flat rate per bag, the rate varying according to the weight of the bag.

The present action is instituted in respect of the failure of the respondent company to deliver 219 of the 1,243 bags of foodstuffs received by the respondent company on behalf of the appellant from the shipowner. The action is based on breach of contract by the respondent company " to clear, land and deliver to the plaintiff ", the goods received by it on the appellant's behalf. The resopndent company denies the contract alleged by the appellant and avers that it unloaded and landed the cargo in pursuance of a longstanding arrangement with the shipowners. It also specially denies negligence as alleged by the appellant and pleads that owing to the exceptional conditions prevailing in the port of Colombo at the material time it is not liable for any loss of any cargo received by it at that time.

At the trial ten issues were settled. Of these it is sufficient for the purpose of this decision to specifically mention the two following issues :—

" (1) In 1942 did the defendants carry on business as
(*a*) Common carriers ?
(*b*) clearing and landing agents ?
(2) Did the defendant company agree and undertake with the plaintiff and/or Mackinnon Mackenzie Company to clear, land and to deliver to the plaintiff in carts or conveyances provided by the plaintiff certain consignment of goods belonging to the plaintiff ex S.S. Ninghai on or about May 30, 1942 ? "

The learned District Judge held that the respondent company was a common carrier and that it was a clearing and landing agent but that there was no contract between the appellant and the respondent company. He also held that there was a contract between the respondent company and Mackinnon Mackenzie & Co., Ltd., the agent of the shipowner. He dismissed the appellant's action on the authority of the decision of this Court in the case of *Assena Marikar v. Livera*[1].

In appeal counsel for the appellant contended that the authority on which the learned District Judge rested his decision has no application to the facts of this case. A close examination of the facts on which *Assena Marikar v. Livera* (*supra*) was decided reveals that counsel's contention is correct. Counsel for the appellant while maintaining that the learned District Judge's finding that the respondent company was a common carrier was correct urged us to reverse his finding that there was no contract as alleged in the plaint. Counsel for the respondent company challenged the finding that it was a common carrier while maintaining that there was no contractual relations between the appellant and the respondent company.

I shall first deal with the respondent company's claim that in regard to the cargo in dispute it acted as landing agent for the shipowner. The evidence of the arrangement between the shipowner and the respondent company is by no means precise. It appears that since about 1900 the respondent company had a general authority to go on board ships belonging to the British India Steam Navigation and receive cargo therefrom. In regard to the cargo which the consignee took delivery at the ship's side through the agency of the respondent company it acted

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

for the consignee, in regard to the cargo that was not delivered to the consignee at the ship's side it seems to have acted for the agents of the shipowner. In view of the general authority of the respondent company, when cargo arrived by ships of the British India Steam Navigation Company consignees have found it convenient to engage it because any other landing agent was not permitted to go on board ship without a special authority from the shipowner's agent.

The letter P6 is consistent with the appellant's position that the respondent company landed his cargo in pursuance of a standing agreement with him. In law where the shipowner lands the cargo without delivering it at the ship's side, unless otherwise provided by any special contract or statute, his liability does not cease on the landing of the cargo though his liability as carrier may. [Hailsham Vol. 30 page 696.] An examination of the clauses as to delivery in the bills of lading D1 and D2 confirm the view I have expressed above. They provide as follows :—

> " In all cases and under all circumstances the Company's liability shall absolutely cease when the goods are free of the vessel's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or the consignee. "

> " Bills of Lading must be presented and delivered up cancelled before delivery of goods will be granted. The Company is to have the option of delivering these goods, or any part thereof, into receiving ship, on boat or craft, on landing them at the risk and expense of the shipper or consignee as per scale of charges to be seen at the Agent's office, and is also to be at liberty until delivery to store the goods or any part thereof in receiving ships, godown, or upon any wharf, the usual charges thereof being payable by the shipper or consignee. The Company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. "

The shipowner or his agent has not been called to say that he exercised the option of landing the cargo at the appellant's risk. In fact there was no occasion for it seeing that the appellant was prepared to take delivery at the ship's side, nor was he entitled in law to land the cargo at the consignee's risk when the respondent company produced the documents of title and took delivery on behalf of the consignee and gave a complete discharge. When a ship arrives in port the shipowner is bound upon payment of his charges and production of the bills of lading to deliver to the consignee his goods over the ship's side if so required. [Abbott on Shipping p. 445—13th Ed.] If the consignee fails to take delivery the master may land and warehouse the goods at the consignee's risk if empowered by the terms of the contract or by the custom of the port. [Hailsham Vol. 30 s. 694.]

The learned District Judge's decision on this point cannot, therefore, be upheld.

It is in evidence that for a period of over 15 years when goods consigned to the appellant arrived in Colombo by any ship owned by the British India Steam Navigation Company, the respondent company land and delivered the goods as a matter of course. It even paid, on more than one occasion, claims for loss made by the appellant.

The respondent company admits that the goods specified in the bills of lading D1 and D2 were received from the shipowner and it does not seriously dispute the non-delivery of 219 bags of the cargo so received, nor is any explanation offered as to how the loss occurred. It however seeks to escape liability by virtue of a circular dated April 28, 1942, P16. This circular was sent to all the consignees whose names were on a list kept by the respondent company and copies were posted in each of the King's warehouses in which the respondent company operated. It reads :—

> " We have to inform you that the conditions in the harbour prevent us from performing services to our clients in the usual manner and while we are doing everything in our power to overcome all difficulties, we regret that we cannot accept any responsibility for theft, pilferage, shortage, damage, or misdeliveries of cargoes which were either in warehouses, barges, &c., on and after 5th April, and until such time as we can assume full control of our activities. "

There is no proof that the circular was sent to the appellant, or that he was fixed with knowledge of it. He not only denies that he received it but also denies all knowledge of it. Unless knowledge of the circular is directly or constructively brought home to the appellant he is not in law bound by it. It is not sufficient to show that notices have been publicly posted up in the carrier's office, in writing or in print. Unless the party who is to be affected by it is proved to have read it or other circumstances are adduced which establish his knowledge of it he will not be subject to its limitation. Even a notice published in a newspaper is not sufficient proof unless accompanied by some evidence that the party is accustomed to read the newspaper so as to lay a foundation for presuming knowledge. In all cases where notice cannot be brought home to the person interested in the goods, directly or constructively, it is a mere nullity, and the carrier is responsible according to the general principles of the common law. [Story on Bailment 6th Ed. paras. 558. 560.]

Although the learned District Judge says :—

> " From all the evidence led one cannot but arrive at the conclusion that the shipping agents did deliver all the bags to the defendant company who landed them in the Government warehouses as is shown by exhibits D4 to D10. "

I am unable to find, either in the documents mentioned by him or elsewhere, any support for his statement. I shall first discuss the documents mentioned by the learned Judge. D4 is a general sufferance inwards authorising the unloading of sundry goods from the Ninghai into Delft warehouse. D6 and D8 are requests by the respondent company to land some of the cargo from the Ninghai into F2 and Kochikade warehouses respectively. None of the documents afford proof of the deposit of cargo in Government warehouses. D5, D7 and D9 are three sets of boatnotes which bear on their face remarks which go to show how many of the packages specified therein were actually landed. D5 is a set of 38 boatnotes. Their examination reveals that 292 of the packages specified therein were not deposited in the Delft warehouse.

The 4 boatnotes marked D7 reveal that 329 of the packages entered therein were not deposited in the warehouse while the 23 boatnotes marked D9 show that 3 packages in excess of the total quantity specified were deposited in the warehouse. The nett result is that 618 of the packages specified in D5, D7 and D9 which the respondent company on their own documents received from the shipowner were not delivered at the King's warehouse and are unaccounted for. D10 and D11 afford no proof of landing of their packages.

The respondent company's own documents which I have examined above completely negative Mr. Galbraith's statement :—

"So far as we are concerned there was no shortage from that ship. We received a certain number and we delivered a similar number."

What then is the respondent company's liability in respect of the loss and what is the law that applies in the determination of that liability ?

According to the Civil Law Ordinance the law relating to the carriage of passengers and goods by ships, and carriers by land is the English law. Questions relating to the carriage of goods by land do not arise in the present case. Here we are concerned with the law applicable to the carriage of goods by boat or barge or lighters, as boats used for the transport of goods in the port of Colombo are commonly called. It was argued that the law relating to carriage of goods by ship is the law that applies. I am unable to agree with this contention. The expression "ship" is not defined in the Civil Law Ordinance and should therefore be understood in its ordinary meaning. The Oxford Dictionary defines the word as any sea going vessel of considerable size. The New Standard Dictionary defines it as a large sea going vessel. A sea going vessel is one that crosses the high seas. Coasting vessels and vessels that ply between ship and shore do not come within the ordinary meaning of the expression "sea going vessel". The wide meaning given to the expression "ship" in the Merchant Shipping Acts cannot in my opinion be imported to our Civil Law Ordinance. Nor will in my view the words "and generally to all maritime matters" afford sufficient authority in this context for extending the English Law relating to ships to the carriage of goods by water in Ceylon. The preceding words clearly limit the scope of the general words.

If English Law is not the law that applies, the questions arising for decision must be solved according to Roman Dutch Law subject, of course, to any statutory modification of that law. There is no evidence that the lighters or barges used by the respondent company were boats licensed under the Boats Ordinance. We need not, therefore, consider the provisions of that Ordinance. Neither the provisions of the Master Attendant Ordinance nor the Customs Ordinance affect the questions arising herein which must therefore be decided by the rules of Roman Dutch law alone.

Under that law the liability of a carrier depends on whether he is a carrier by trade or has merely consented to a particular act of carrying. A carrier by trade is governed by the Praetor's Edict "De Nautis Caponibus et Stabulariis" [Digest Bk. IV Tit. 9.]. Grotius [Maasdorp's translation p. 671] Van Leeuwen [Censura Forensis V. 30.3.6] and Voet

[Comm : ad. Pand : IV, 9.10.] (Sampson's translation p. 133) are all agreed that the Edict is a part of the Roman Dutch law except in regard to the penalty for double damages which according to Gronewegen has been abrogated [Gronewegen De Legibus Abrogatis ad. Dig. IV. 9.]. The liability of carriers other than those who are engaged in the trade of carrying is determined according as whether the carriage is gratuitous or for a price. Where the carriage is gratuitous the contract is regarded as a *depositum* and the depositary is only bound to show ordinary diligence. He is not liable for loss by accident or slight negligence. The onus is on the consignor. Where the carriage is for a price the contract is one of *locatio operis mercium vehendarum* and the carrier must in the performance of his duty show the skill of an ordinary reasonable carrier. He is not liable in case of theft or robbery or for any loss which could not have been averted by the exercise of the care of an ordinary reasonable carrier. The onus, unlike in the case of gratuitous carriage, is on the carrier.

In order to ascertain the liability of the respondent company we must first decide whether it is a carrier by trade or not. This is a question of fact. On the evidence in the case there can be no doubt that the respondent company is a carrier by trade. There is both oral and documentary evidence which points unmistakably to this fact. I shall therefore make no further reference to the law relating to other carriers and shall now proceed to discuss the law applicable to this case. But before I do so, I shall refer briefly to the major differences between the liability of a common carrier under English law and a carrier by trade under the Roman Dutch law. Under both systems the carrier is not liable for loss occasioned by inherent vice or negligence of the consignee. The other exceptions to a carrier's liability are—under the English law, Act of God and King's enemies, and under the Roman Dutch law, *Vis Major* and *damnum fatale*. Act of God and *damnum fatale* are the same and comprise shipwreck and natural causes ; but *Vis Major* is wider concept than King 's enemies. It not only included loss occasioned by foreign forces and pirates but also extends to losses by fire and robbery. Under the English law the common carrier is bound to carry for anyone who demands his services. There is no authority for saying that such an obligation exists under the Roman Dutch law. In fact Morice even goes further. He says :—

> "Lastly, it must be noted that carriers by sea, inn-keepers and stable-keepers are not, like common carriers, in English law, under any compulsion to receive goods entrusted to them. They are free contractors." (Morice on English and Roman-Dutch Law, p. 188, 2nd ed.).

Under both systems, upon proof of receipt of the goods by the carrier and their loss or non-delivery to the consignee, the carrier is liable unless he can bring himself within the exceptions, the onus of proof being on the carrier. The exceptions are not a valid defence where they have been brought about by the carrier's negligence.

In the present case the conduct of parties and the evidence is sufficient to justify an inference of an agreement not only to carry the appellant's goods but to carry them subject to the liability of a carrier by trade. The

appellant has proved that the respondent company received his full cargo and that it has failed to deliver 219 bags of that cargo. The respondent company has failed to prove delivery of the 219 bags even at the King's warehouse and has not brought itself within any of the exceptions which exempt it from legal liability. We need not in view of our finding of fact that the respondent company has failed to prove delivery of the lost bags at the King's warehouse discuss its liability on the footing they were lost after deposit in the warehouse.

For the above reasons the judgment of the learned District Judge is set aside and the appeal is allowed with costs.

JAYETILEKE J.—I agree.

Appeal allowed.