1964 *Present :* **T. S. Fernando, J., and Sri Skanda Rajah, J.**

CARGO BOAT DESPATCH CO. LTD., Appellant, *and* MOOSAJEE LTD., Respondent

S. C. 500/59—D. C. Colombo, 45008/M

Carrier by trade—Carriage of goods from ship to shore—Extent of the obligations imposed on the carrier.

Where a carrier by trade is employed to transport goods from a ship to the Customs warehouses, the carrier's responsibility comes to an end when the goods, on being deposited in the warehouses, are exclusively within the control of the Customs authorities.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, for defendant-appellant.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte, L. C. Seneviratne* and *N. E. Weerasooria* (Jnr.), for plaintiff-respondent.

Cur. adv. vult.

July 6, 1964. T. S. FERNANDO, J.—

The S. S. Lenko arrived in the port of Colombo on June 7, 1957, with a cargo of 99,520 bags of Saphos ground phosphate (fertilizer) and 350 empty bags, making a total of 99,870 bags. This cargo was intended for four consignees, one of them being the plaintiff company to which 4,000 bags were consigned. There were no special markings to distinguish the bags intended for the different consignees. All bags had only the stamp 'Saphos' on them.

In accordance with the arrangement obtaining in the port, the Port Priority Committee entrusted the discharge of the entire cargo from the ship in question to the defendant company which has been held by the District Judge to be a carrier by trade. The employees of the defendant received the entire cargo into lighters over the ship's side between the 19th June and the 4th July.

The three other consignees have removed the cargo respectively consigned to them. Delivery of the 4,000 bags consigned to the plaintiff was commenced only on the 18th July. By the end of the next day, the 19th July, delivery was taken by the plaintiff only of 3,527 bags. According to the plaintiff's own witness the delay in taking delivery was due to a strike of the plaintiff's own employees. The balance 473 bags was not to be found. In the present action the plaintiff sought to recover the value of the 473 bags short delivered, claimed to be Rs. 6,183·04. Giving credit to the defendant in a sum of Rs. 810 which the plaintiff admitted was owing to the defendant, the plaintiff asked for judgment in a sum of Rs. 5,373·04. At the end of the trial, the learned District Judge entered judgment in favour of the plaintiff for the said sum of Rs. 5,373·04. The appeal seeks a reversal of this judgment.

The trial judge has held (i) that he was not satisfied that the defendant has landed into the Customs warehouses the entire cargo received by the defendant from the ship; (ii) that, assuming that the entire cargo has been landed into the warehouses, the shortage or disappearance of 473 bags of Saphos could not have taken place without the cognizance of the defendant's employee at the barrier to the warehouse in which the 4,000 bags destined for the plaintiff had been stored; and (iii) that the loss was

due to the refusal or neglect of the defendant's employees to issue the cart passes which alone would have enabled the plaintiff to remove the goods consigned to it.

It was contended by counsel for the defendant that the learned trial judge's finding No. (i) referred to above is wrong and is contrary to the very evidence led on behalf of the plaintiff. Nadarajah, a clerk of the Customs Department, who was the principal witness called for the plaintiff in regard to the question of landing and delivery of the goods, stated that " the number (of bags) receipted and landed was 99,870 " ; " the entire 4,000 bags had been landed into the (Hangar) warehouse " ; " 4,000 bags were landed into the H. 3 (an abbreviation for Hangar No. 3) warehouse ", " nothing else had been landed into this warehouse ". All this evidence was given in examination-in-chief. He was, of course, speaking from the documents produced on behalf of the plaintiff. He was the only person called to speak to these which included the relevant boat notes. The boat notes serve not only as a receipt to the master of the ship showing that the cargo has been landed into the boats over the ship's side but also to fix the owner and tindal of the boat with responsibility for the due landing and delivery at the Customs Warehouse of the cargo specified therein.

While the evidence of Nadarajah *prima facie* established due delivery or landing at the Customs warehouse, the learned trial judge appears to have undertaken by himself an examination of the various boat notes covering the 99,870 bags, and has observed that in one of them (boat note bearing No. 874) the full quantity of 626 bags specified has not been reported landed. From an entry which appears to read " landed 448 only—short ", the trial judge concludes that 626 less 448, i.e., 178 bags were not landed. He has taken no note of the initials " R. L. C. " appearing at the foot of that boat note, and it is common ground that these initials stand for " reported landed correct " and are made by some officer on behalf of the Customs. Where Nadarajah was the witness whom the plaintiff called to explain the documents which were themselves produced on behalf of the plaintiff, it was, in my opinion, imperative that Nadarajah should have been questioned on the entry before any interpretation other than that given by him was placed on it. It was not a self-explanatory entry when it was accompanied by the other entry 'R. L. C.' If there was to be interpretation of the entry, that interpretation should have come from Nadarajah or the interpretation placed by the judge should have been suggested to him. With respect, in the face of Nadarajah's evidence, the interpretation placed by the judge assumes the character of a speculation.

A similar failure to question Nadarajah occurred in respect of the other boat note which the judge refused to accept at its face value. This is boat note bearing No. CPC. 18 in respect of 1,046 bags. There is one entry on this note that 771 bags were landed and another entry that 275 bags were landed. These add up to 1,046 bags. The learned

judge refers to the absence of the initials " R. L. C. " on this boat note, and concludes that there has been some short delivery of this number of bags as well. The Customs Department, it must be assumed, is no less interested than a consignee himself in seeing that cargo taken over the ship's side is landed into the warehouses. There is no suggestion that the Customs Department has raised any question of a short-landing into its warehouses of the cargo ex S. S. Lenko. On the contrary, the evidence of Customs clerk, Nadarajah, suggests clearly a landing of the full cargo specified in the ship's manifest. In the present instance, of course, the plaintiff had paid customs dues and charges apparently even before the cargo had begun to be warehoused. There is no evidence that the other consignees had done the same, but the payment of customs dues and charges is something that will come to be checked up only when the goods are sought to be cleared and taken out of the warehouses, and there is no reason to think that customs checkers at the warehouses would have known of the payment of dues or that, had they known, they would have been indifferent as to the quantity warehoused.

A reference to the plaint and the issues framed also justifies the argument of counsel for the defendant at the hearing of the appeal before us that the plaintiff relied in this case principally on a failure by the defendant to deliver the entire number of bags consigned to it. That fact may explain why, in leading the evidence of Nadarajah, the landing of the 4,000 bags into the warehouses was assumed on the documents relied on by the plaintiff company itself.

The circumstance that 473 bags were actually short is taken by the learned trial judge as indicating a failure to land that number of bags into the warehouses. It may be equally consistent with a loss from the warehouses after landing has been effected. Nor can the fact that the defendant wrote to the plaintiff at one time that the bags said to be short were in one warehouse and at another time that they were in some other warehouse help to decide the question of non-delivery into the warehouses. These warehouses, according to the evidence, are very large places in which large quantities of various kinds of cargo are stacked, and the fact that the defendant was unable at one time to say into which particular warehouse of the three warehouses in respect of which sufferance had been granted to the defendant to land this ship's cargo the plaintiff's balance Saphos had been delivered is understandable.

In the course of his judgment, the learned trial judge observes that Nadarajah called by the plaintiff company to prove its case has been fully exploited by the defendant company to advance its defence. It is somewhat difficult to understand this observation. It is legitimate for one party to elicit from a witness of his opponent any facts that would be favourable to it, but in the present instance all the evidence the defendant sought to utilise was elicited from Nadarajah in the course of his evidence-in-chief. In the face of Nadarajah's evidence in respect of the documents, inferences from an examination of the documents

undertaken by the learned judge on his own, without at least a questioning of Nadarajah, the plaintiff's own witness, were not, in my opinion, permissible in the circumstances. Moreover, the inferences made by him from entries or the absence of entries on the documents specified by him are by no means plain.

In my opinion, the evidence called for the plaintiff itself established a landing into the Customs warehouse or warehouses of the 4,000 bags consigned to the plaintiff. Finding No. (i) reached by the learned trial judge has, therefore, to be reversed.

What is the result of the finding now reached by me that there was a landing into the Customs warehouse of the full consignment? Several fairly recent cases have dealt with the liability of a carrier by trade. These have been referred to by the learned District Judge in his judgment, and their effect has been correctly summarised by him. The learned judge himself apprehended that, according to the law as set out in these decisions, a carrier by trade can avoid liability if he proves he has duly landed all the cargo received into the Customs warehouses. In view of the reversal of finding No. (i) referred to above and the conclusion that there has been due delivery into the warehouse, the defendant is not liable to make good any damage suffered by the plaintiff by a loss occurring thereafter.

The position would have been different if the defendant had undertaken an additional liability as bailee or insurer of the goods while they were lying in the Customs warehouse or warehouses. There is no evidence of any such undertaking by the defendant. When the Priority Committee allocated the business of landing cargo ex S. S. Lenko to the defendant, a carrier by trade, certain obligations attached to the defendant when it undertook the work. Gratiaen J. in *Alibhoy v. Ceylon Wharfage Co. Ltd.*[1] has set out what he understood to be the obligations thereby imposed on the carrier. It must, however, be emphasized that, in setting out the obligations as he did, he was only making reference to legal issues that generally arise in cases of this kind. In regard to these particular statements relating to the obligations imposed on a carrier, Weerasooriya J. (Sansoni J. agreeing), in the later case of *The Ceylon Wharfage Co. Ltd. v. Dada*[2], stated :—

> "It seems, however, that the observations of Gratiaen J. in that connection were not intended to imply that the obligation to give delivery from the Queen's warehouse is one of the normal incidents of the contract of carriage of goods from ship to shore as in the concluding portion of his judgment he affirmed the view expressed in the two earlier cases that the carrier's responsibility was at an end where the goods on being deposited in the Queen's warehouse were exclusively within the control of the Customs authorities."

I am in entire agreement with the observations reproduced immediately above and, in view of my reversal of finding No. (i) as already stated, it follows that the plaintiff's action should have been dismissed.

[1] *(1954) 56 N. L. R. at page 475.* [2] *(1957) 59 N. L. R. at page 112.*

On account of the result thus reached, it becomes unnecessary in the state of the relevant law, to consider the correctness of the alternative findings of the learned District Judge.

The judgment and decree appealed against are set aside. I direct that the plaintiff's action be dismissed with costs in both courts and decree be also entered directing the plaintiff to pay to the defendant the sum of Rs. 810, admitted to be due to the defendant, with legal interest on that sum from 25th September 1958 to date of decree and thereafter on the aggregate amount of the decree till payment in full.

SRI SKANDA RAJAH, J.—I agree.

Appeal allowed.