

1968

*Present : Alles, J., and Tennekoon, J.*

THE CHINA PACIFIC NAVIGATION CO. LTD., HONG KONG,  
Appellant, and MESSRS JAFFERJEE BROTHERS,  
Respondents

*S. C. 14/1965—D. C. Colombo, 52716*

*Contract—Carriage of goods by sea—Goods damaged in transit—Consignee's claim for damages on ground of improper stowage—Burden of proof.*

Where a consignee of goods sues the carrier for damages on the ground that damage was caused to the goods as a result of improper stowage on board the ship during its voyage, it cannot be said that the carrier did not "properly and carefully" stow the goods, unless there is evidence (1) of a custom of the trade that the goods should be stowed in a particular manner or (2) of special directions by the consignee as to the manner of stowage or (3) that the carrier ought to have known that special storage arrangements were necessary for the goods. In the absence of any such evidence, the plaintiff cannot succeed in his claim even if he places *prima facie* evidence of the sound condition of the goods at the time they were placed on board the ship at the port of embarkation, unless he establishes beyond doubt that there was some external cause or event on board the vessel which directly resulted in the damage to the goods.

**A**PPPEAL from a judgment of the District Court, Colombo.

*H. W. Jayewardene, Q.C., with A. N. U. Jayewardene and I. S. de Silva,*  
for the defendant-appellant.

*S. Nadesan, Q.C., with B. A. R. Candappa and J. Lalith C. Rodrigo,*  
for the plaintiffs-respondents.

*Cur. adv. vult.*

March 9, 1968. ALLES, J.—

The defendant appeals from a judgment of the District Court awarding the plaintiffs a sum of Rs. 18,848 70 being the assessment of damages suffered in respect of a contract of carriage of a consignment of 800 bags of chillies carried in the defendants' steamship 'Clyde Breeze' from the port of Whampoa in China to Colombo. The plaintiffs' case was that the chillies were damaged as a result of improper stowage on board the vessel during its journey from Whampoa to Colombo. According to the Bill of Lading (PI) 800 bags of 'dried red colour chillies, quality 1959 crop of the Wenkiang and Mien Yang variety, packed in new single gunnies' were shipped on board the 'Clyde Breeze' in 'apparent good order and condition' on 13th March 1960 and arrived in the port of Colombo on 28th April 1960. The plaintiffs' cargo was stowed in Hold No. 14 together with 472 bags of chillies of the 'Yitu Yitu' variety belonging to another consignee. The discharge of the cargo contained in Hold No. 4 commenced on 30th April 1960 and continued till about 25th May 1960. On 14th May 1960, a fire was discovered among the bags of chillies in Hold No. 4; the Port Fire Bridge was summoned and the fire was brought under control after about five hours by spraying sea water on some of the bags. Out of the plaintiffs' consignment, 278 bags which were found to be blackened, had been discharged by 9th May 1960, before the fire broke out on 14th May 1960; the rest of the consignment was still on board the vessel; out of this quantity, 341 bags were condemned by the authorities as unfit for human consumption and were dumped into the sea; 181 bags had got wet by sea water and were discharged in a damaged condition. In this action, the plaintiffs claimed damages in respect of the 341 bags which were not delivered at all and for the 459 bags which were partially damaged, and alleged that the damage resulted from improper stowage on board the vessel. The defendants on the other hand maintained that the plaintiffs had failed to prove the condition of the chillies at the time of shipment and attributed the deterioration of the chillies and the fire to inherent vice in the cargo. The learned trial Judge has drawn the inference from the evidence called by the plaintiffs that the damage to the chillies resulted from improper stowage.

Musater, the Superintendent of the Port Fire Brigade, came on board the 'Clyde Breeze' in connection with the fire that had been reported to him at 9.26 a.m. on 14th May 1960. He was informed by the ship's officers that a pungent smell of burning chillies was found on opening Hold No. 4 and he noticed a stack of chillies in bags smouldering and smoke rising from the bags. He was unable to get to the bottom of the hold because the hold was completely packed with cargo except for ten feet from the deck level downwards. According to P6, which was Musater's report on the fire, 'as the top tiers of the chilly bags were shifted on to the deck and the smouldering bags exposed to air, a number of them burst into flames. All this time a minimum quantity of water was used to save the cargo from water damage. But as soon as the flames shot up

two spray jets were used . . . . to prevent the fire spreading.' In Musafar's opinion, the fire had commenced from the centre of the stack of bags and was due to spontaneous combustion.

Rajamoney, who had been a Lloyd's surveyor for nearly eight years' visited the 'Clyde Breeze' on 15th May 1960 and thereafter daily from the 16th to the 19th of May and the 10th June, and inspected the cargo in Hold No. 4. His first visit was at the instance of the defendants' agents, Razack & Company and at the time of his visit there were 755 bags in Hold No. 4. Rajamoney's observations were incorporated in his report P3 issued to Razack & Company dated 16th May 1960. The contents of P2 and P3 are almost identical and his report on the condition of the plaintiffs' consignment was to the following effect :—

- (a) 181 bags were wet by water but unaffected by fire. The contents of the bags were found to be mouldy but saleable and taken delivery of by the consignees.
- (b) 341 bags were damaged and found to be unfit for human consumption and were retained on board and dumped into the sea on 6th June, 1960.
- (c) 278 bags discharged before the fire were inspected in the warehouse and consignees' stores and found to be discoloured and impoverished. The bags were however sound and unaffected but the chillies had lost their characteristic colour and pungency. He attributed deterioration of these chillies to heating.

Rajamoney's personal observations of his inspection of Hold No. 4 sheds some light on the manner of stowage. In his report P3, he has included the Master's protest and according to Rajamoney, the Master informed him that a consignment of rice bran shipped at Rangoon had been stowed on top of the chillies which were already in the hold. There is circumstantial evidence which supports the Master's statement that bags of rice bran had been stowed on top of the chillies. Rajamoney found damaged bags (which included a portion of the plaintiffs' consignment) at the bottom of the hold ; the rice bran had been picked up at Rangoon in the course of the voyage ; the boat notes P14, P15, P16 and P17 establish that 622 bags of rice bran which constituted the entire consignment, were discharged before the fire and this consignment must have taken the space of the 10 feet below the deck which was noticed by Musafar when he visited the vessel on 14th May. The evidence is that each bag of rice bran weighed between 112 and 140 pounds and that a bag of chillies loosely packed weighed approximately 55 pounds. The pressure therefore of the 622 bags of rice bran must have been considerable and it is submitted by Counsel for the respondent that this fact alone was sufficient to indicate that the chillies were improperly stowed. Rajamoney states that he noticed that the bags of chillies were stowed against the bulkhead, stacked tier upon tier without any dunnage and with no air channels between the tiers. According to Rajamoney, the bags had got

damaged by heating due to ineffective ventilation. The heating had commenced from the centre of the bags and once the smouldering commenced it would have taken time to catch fire. In his view, the deterioration of chillies and the subsequent fire was the result of the pressure of the bags stowed on top of the chillies coupled with the ineffective ventilation available.

Hoffmann, who was called as an expert stated that chillies had a tendency to generate heat. In his view, chillies should be stacked loosely and ventilation was necessary to allow the heat that is naturally generated by chillies to some extent to dissipate. Hoffmann, who expressed his views after an examination of P2, P3 and P6, supported Rajamoney when he stated that if the cargo was pressed and confined, temperature would build up in the centre particularly at the bottom and with the increase of temperature heating takes place and fire is caused by spontaneous combustion when air is introduced.

On the evidence of Musafar, Rajamoney and Hoffmann, the learned trial Judge came to the conclusion that there was improper stowage on board the vessel which ultimately resulted in insufficient ventilation and caused the spontaneous combustion of the chillies and accordingly held that the plaintiffs were entitled to succeed.

It is common ground that the contract of affreightment in this case is to be found in the Bill of Lading P1, and the Hongkong Carriage of Goods by Sea Ordinance of 1928 which has been marked 'X' in these proceedings. The Bill of Lading itself contains no special provisions in regard to the manner and conditions of stowage. Section 2 of Article III of the Ordinance reads as follows :

“ Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep care for and discharge the goods carried. ”

The question that arises for consideration in this case is whether, in spite of the acceptance of the evidence of Musafar, Rajamoney and Hoffmann, the learned trial Judge was justified in reaching the conclusion that the damage to the chillies arose as a result of improper stowage to make the defendant liable under the contract.

There is no evidence in this case of any custom of the trade that chillies should be stowed in a vessel in a particular manner. The evidence of the witnesses called on behalf of the plaintiffs only relate to their special knowledge of the perishable nature of the consignment and the desirability of stowing the goods in a particular manner. Their evidence does not establish any kind of custom in the trade well known to the parties as to the manner in which a consignment of chillies should be carried. Having regard to the absence of any special directions by the shipper as to the manner of stowage, have the defendants 'properly and carefully' stowed the goods on board their vessel? The consignment of chillies

belonging to the plaintiffs was only a small part of the cargo carried on this vessel and the shippers would normally have been aware that in the course of the voyage to Colombo, the carrier would have to pick up other cargo at other ports. There is evidence in this case that a heavy cargo of rice bran was loaded on this vessel at Rangoon. In my view if the shippers wished to safeguard their cargo, they should have given special directions that no heavy cargo should be loaded on top of the chillies. Of course this would have raised the cost of freight, for if such a condition was imposed, it would have been necessary for the carrier to unload the consignment of chillies at Rangoon, load the rice bran and then reload the chillies. Again, if the shippers were aware that chillies were goods that generate their own heat and that unless they were stowed in a manner specially appropriate to goods of that kind, they would deteriorate quickly, it was, in my view, incumbent on the shippers, if they wished to avoid the activation of an inherent vice in the chillies themselves by being treated as cargo requiring no special stowage precautions, to give specific directions to the carrier that no heavy cargo should be loaded on top of the chillies, that the carrier should expeditiously transport the cargo to the port of discharge and that there should be sufficient ventilation between each layer of bags and around them. In the absence of any such special directions, it cannot be said that in terms of the contract the carrier had not 'properly' stowed the chillies on board the vessel. The evidence accepted by the trial Judge is based on inferences drawn from the fact of spontaneous combustion, blackening and loss of pungency; these are not necessarily the result of improper stowage. This condition may have arisen owing to the nature of the cargo, the ordinary temperatures prevalent in the hold of a ship voyaging through the climatic regions which it had to pass during some of the hottest months of the year; the voyage itself took about one and a half months and the discharge of the cargo was not completed till another month went by. I would in this connection quote the words of Lord Reid in the House of Lords in the recent case of *Albacora S. R. L. v. Westcott and Laurence Line Ltd.*<sup>1</sup> This was a case in which the consignees sued the carrier for damages to a consignment of wet salted ling fillets conveyed from Glasgow to Genoa. It was not disputed that the condition of the fish deteriorated in the course of a long voyage because they were not refrigerated below a certain temperature to prevent the multiplication of bacteria. The holds of the vessel were not refrigerated and 'no one appears to have realised that at any time until evidence was led at the proof. No special instructions were given by the consignor; and none of the ship's officers concerned with the loading and care of the cargo were aware of the particular conditions of temperature and access to air in which the bacteria could be activated. This was an unusual cargo for such a voyage and it was not proved or argued that they ought to have been aware of this danger.' Lord Reid did not accept the submission on behalf of the shippers that the word 'properly' means 'in the appropriate manner looking to the actual nature of the consignment, and that it is

<sup>1</sup> (1966) Vol. 2 *Lloyd's Law Reports* 53 at p. 57.

irrelevant that the ship-owner and the ship's officers neither knew nor could have discovered that special treatment was necessary'. He agreed with Lord Kilmuir in *Renton v. Palmyra Trading Corporation of Panama*<sup>1</sup> that the word 'properly' means in accordance with a sound system. He then explains what he considered to be a sound system in the following language :—

"In my opinion the obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods. And if that is right then the respondents did adopt a sound system. They had no reason to suppose that the goods required any different treatment from that which the goods in fact received."

The House of Lords unanimously dismissed the shippers' appeal and held that the carrier was not liable for the deterioration of the cargo.

In the instant case, in my view, similar considerations apply. If the shippers professed to know the conditions in which the chillies should have been transported, it was their duty to inform the carrier of the special conditions that were necessary for the transport of consignment of this nature and in the absence of any such information to the carrier, and in the absence of any evidence to establish that the carrier ought to have known that special storage arrangements must be made for a cargo of chillies, it could not be said that the defendants were in breach of their contract to 'properly and carefully' stow the chillies on board their vessel.

The only other manner in which the plaintiffs can succeed in this action is to establish that there was some external cause or event on board the vessel which directly resulted in the damage to the consignment of chillies. In such a case it will not be necessary for the plaintiffs even to establish the sound condition of the chillies before they were placed on board at the port of embarkation. If the question is left in doubt, as to whether the damage to the consignment arose as a result of the deteriorated condition when shipped or from some cause that arose on board the vessel, the plaintiffs will not be entitled to succeed. In this case, there is an absence of evidence of any deterioration of the goods at the time of shipment—they were accepted on board ship in apparent good order and condition and it is not open to the plaintiffs to maintain, in view of what has been stated earlier, that the defendants had not properly stowed the chillies. In this connection, the facts of this case are different from the facts in *Hoore v. Harris*<sup>2</sup>. In that case, the position of the plaintiffs, the shippers, was that during the voyage an epidemic of scarlet fever broke out among the steerage passengers and under the advice of the surgeon, chloride of lime and carbolic acid was widely used all over the ship. The packages of tea were stowed under the cabin occupied by some of the infected passengers and when the packages

<sup>1</sup> (1957) A. C. 149 at 166.

<sup>2</sup> (1876) *Law Times* 519

were opened at the port of disembarkation, they were found to be impregnated with carbolic acid. Their Lordships in the Privy Council held that the plaintiffs made out a strong *prima facie* case that the damage was done on board ship and made the following observations at p. 520 :—

“ They also think that the Judges gave undue weight to the consideration that the plaintiffs offered no proof of the condition of the tea when shipped. There is not, and, in the nature of things, cannot be, any general rule of law or evidence on the subject. It must depend on the circumstances of each case, how far such proof is necessary, and the case is said to be inconclusively proved without it. Where, for instance, a cargo of grain is found to be heated—a damage which may arise either from its bad condition when shipped, or from some cause existing in the ship—it may be essential to prove the state of the cargo before its shipment. But where, as in this case, noxious substances, calculated to produce the peculiar damage actually present, are found to have been used in close proximity to the tea, cause and effect are so nearly brought together that a conclusion can be reached without proof of its condition at the time of shipment.”

In the present case, in view of what I have stated earlier on the issue of proper stowage, there is at the lowest, a doubt as to whether the carrier was responsible for the fire on board ship and in the circumstances it is not quite necessary to deal with the question whether the plaintiffs in this case had satisfied the Court of the condition of the chillies at the time the consignment was placed on board at the port of embarkation. Since however this matter has been argued at length in the course of the hearing, we propose to express our views on the point raised.

According to the defendants the deteriorated condition of the chillies at the time of discharge was not necessarily attributable to improper stowage after shipment but was equally consistent with the chillies having been in that condition at the time of shipment. It was submitted by Counsel for the defendant-appellant that when the carrier accepted the goods as ‘ being in apparent good order and condition ’ there was no warranty regarding the quality of the chillies and that the burden was on the plaintiffs to prove the condition of the chillies as being sound at the time of shipment. It was conceded by Hoffmann that between the harvesting of chillies, the storage in the shippers’ warehouse and stowing on board the vessel, perishables like chillies could be affected and that the process of deterioration could have commenced even before shipment. Counsel therefore submitted that although P1 described the chillies as ‘ dried red colour chillies of the 1959 crop ’ there was no guarantee that chillies of this quality were put on board the vessel and that the burden was on the consignee to prove the sound condition of the chillies at the time of shipment. In support Mr. Jayewardene for the appellants has referred to several authorities, to some of which I shall presently refer. Mr. Nadesan on the other hand submitted that he had established

the quality of the chillies at the time of shipment and referred to P4 the invoice sent to the consignee by the shippers and also to P7 the manifest of the cargo on board the 'Clyde Breeze' which described the consignment as 'dried red colour chillies'. I am unable to agree with Counsel's submission that P4 and P7 constituted an admission by the ship-owners in regard to the quality of the chillies. These descriptions were apparently obtained from the Bill of Lading P1 and if the words in P1 are not indicative of the quality of the chillies it necessarily follows that the descriptions in P4 and P7 cannot be any evidence of any such indication. In the cases cited by Mr. Jayewardene, in support of the proposition that the burden was on the consignees to establish the condition of the cargo before it was put on board the vessel for shipment to make the carrier liable for any loss or damage, there was always evidence of the physical condition of the cargo before shipment and no reliance was placed on any of the shipping documents. In *The Ida*<sup>1</sup> the shippers led evidence of their agents at Port Said who inspected the consignment of cotton seeds. In *Peter der Grosse*<sup>2</sup> the plaintiffs proved that the consignment of feathers and the down was of first class quality. In *The Tromp*<sup>3</sup>, *The Skarp*<sup>4</sup>, *Martinaeus Ltd. v. Royal Mail Steampacket Co.*<sup>5</sup> and *Dent and others v. Glen Line*<sup>6</sup> the shipowners were aware of the bad condition of the cargo before shipment and in spite of this knowledge issued clean Bills of Lading and consequently in all these cases, the ship-owner was held to be liable. In order therefore to make the ship-owner liable there must be evidence—direct or circumstantial—that the cargo had not deteriorated at the time of shipment.

The learned trial Judge has arrived at the conclusion in this case that there is no evidence that the chillies that were shipped were in an immature or wet condition. There is some evidence to support this finding. According to Rajamoney, if the 278 bags of chillies were discharged before the fire immature and wet, he would have expected to find stains on the gunnies in which the chillies were packed and the contents to be mouldy. This was the condition in which he found the 181 bags that had become wet by sea water. According to Hoffmann, if immature chillies had been shipped, he would have expected them to be reduced to small pieces by the time they reached the port of Colombo. Hoffmann also negated the possibility of the chillies of the Yitu Yitu variety, which was more combustible than the plaintiffs' consignment being the cause of the fire. The inference to be drawn from the evidence of Rajamoney and Hoffmann is that the chillies were not in a deteriorated condition at the time they were put on board the vessel at Whampoa. I agree with the proposition of law submitted by Counsel for the defendants that the words 'in apparent good order and condition' are not indicative of an admission by the ship-owners of the quality of the chillies at the time of shipment. Channell, J. in *Compania Naviera Vascongada v. Churchill and Sim*<sup>7</sup> draws the distinction between 'condition' and 'quality'.

<sup>1</sup> (1875) 32 *Law Times* 541.

<sup>2</sup> (1876) 34 *Law Times* 749.

<sup>3</sup> (1921) 125 *Law Times* 637.

<sup>4</sup> (1935) *P. D.* 234.

<sup>5</sup> (1912) 106 *Law Times* 638.

<sup>6</sup> (1940) *Lloyds Reports* 72.

<sup>7</sup> (1906) 104 *Law Times* 61.



'Condition' he says 'refers to external and apparent condition' and 'quality' to what is usually not apparent or to use the words of Sir Robert Phillimore in *Peter der Grosse* (supra) the chillies 'apparently and so far as met the eye and externally were placed in good order on board the ship'.

In my view the shippers in this case have, through the evidence of Hoffmann and Rajamoney, placed circumstantial and *prima facie* evidence of the sound condition of the chillies at the time of shipment. In the case of *The Ida* (supra) the plaintiffs, the consignees did not succeed in their action against the ship-owners because in the view of Their Lordships in the Privy Council—

- (a) 'they had failed to launch their case by *prima facie* evidence of the condition of the cargo; and
- (b) they had not adduced any conclusive or any cogent evidence for the purpose of showing that the damage which the cargo sustained on the voyage was due to the fault of the ship-owner.'

In the present case although the plaintiffs have placed *prima facie* evidence of the sound condition of the chillies at the time of shipment they have failed to prove that the damage to the consignment was due to improper stowage in terms of the contract. We therefore set aside the judgment and decree of the District Court awarding the plaintiffs a sum of Rs. 28,848-80 being the assessment of damages in respect of the breach of the contract of affreightment and we allow the appeal of the defendants and dismiss the plaintiffs' action. The appellants will be entitled to their costs in appeal and in the trial Court.

TENNEKOON, J.—I agree.

*Appeal allowed.*

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