1971 *Present :* **H. N. G. Fernando, C.J., and Alles, J.**

THE ATTORNEY-GENERAL, Appellant, *and* ASIATIC STEAM NAVIGATION CO. LTD. (incorporated in the United Kingdom), Respondent

S. C. 377/67 (F)—D. C. Colombo, 59084/M

Carriage of goods by sea—Claim for recovery of freight—Burden of proof—Evidenc Ordinance, s. 101—Meaning and effect of expression " right and true " delivery

The plaintiff Company, as owners of a ship, entered into a contract with the Government of Ceylon to convey a cargo of rice from the port of Rangoon, Burma, to the port of Colombo. It was stipulated *inter alia* that they were responsible for tho proper discharge of the full cargo. Their agents both at the port of loading and the port of discharge were the Ceylon Shipping Lines Ltd.

In the present action the plaintiff Company sued the Attorney-General for the recovery of a sum of Rs. 5,145 alleged to be due to them as the balance freight earned by their vessel in respect of the cargo of rice conveyed from the port of Rangoon. It was admitted that 90% of the freight was paid and that the sum of Rs. 5,145 was deducted by the Crown from the balance 10 % payable under the contract if the plaintiffs made *right and true delivery.*

Held, that the burden was on the plaintiffs to prove that they had delivered the entire consignment of rice and to establish the existence of facts which entitled them to claim the legal right to be paid the entire sum due on account of freight (Vide section 101 of the Evidence Ordinance).

Freight, being the remuneration due to the shipowner for the carriage of goods, can only be claimed on due delivery. If there is a default on the part of the shipowner, he is not entitled to be paid for the freight to the extent of his default.

In Shipping Law the words " right and true delivery " have been used to indicate the delivery of the goods by weight or quantity depending on the nature of the contract. Unless the shipowner carries the goods to the destination agreed on and is prepared to deliver his cargo he is not entitled to any part of the freight. The time of payment has no bearing whatsoever on the right and true delivery of the cargo.

APPEAL from a judgment of the District Court, Colombo.

Mervyn Fernando, Senior Crown Counsel, with *G. P. S. Silva,* Crown Counsel, for the defendant-appellant.

K. N. Choksy, with *S. J. Mohideen,* for the plaintiff-respondent.

Cur. adv. vult.

August 9, 1971. ALLES, J.—

The plaintiff Company, as owners of the vessel " Ranee ", instituted this action against the Attorney-General, representing the Government of Ceylon, for the recovery of a sum of Rs. 5,145 alleged to be due to them as the balance freight earned by their vessel in respect of a cargo of rice conveyed from the port of Rangoon, Burma, to the port of Colombo. With their plaint the plaintiff Company filed the Charter or contract marked " A " whereby the plaintiff agreed to load 7,500 tons of rice in bags, 10% more or less, and proceed to one safe port in Ceylon at the Charterer's option. The vessel conveyed no other cargo and did no stop at any intermediate port but came direct from Rangoon to Colombo. The plaint averred that the vessel carried a cargo of 7,586 tons of rice and under the Bills of Lading issued in respect of the cargo, freight was earned by the plaintiffs in a sum of Rs. 120,324·32, which became payable to them by the Government of Ceylon. The Government of Ceylon paid to the plaintiffs the sum of Rs. 115,179·32 on account of freight, withholding a balance of Rs. 5,145 which the plaintiffs sought to recover. The position of the Crown was that the plaintiffs did not deliver 106,208 bags as shown in the Bills of Lading (D1 to D5) but only 106,083 bags and they calculated the loss of 125 bags at Rs. 5,145. It is not disputed that 90% of the freight was payable on breaking bulk and the balance three days later on *right and true delivery*. It is admitted that 90% of the freight was paid and that the sum of Rs. 5,145 was deducted by the Crown from the balance 10% payable.

It seems apparent on the pleadings that the burden was on the plaintiffs to prove that they had delivered the entire consignment of rice specified in the contract of carriage and that they thereby earned the sum of Rs. 120,324·32 as freight; and it was the duty of the plaintiffs to establish the existence of facts which entitled them to claim the legal right to be paid the entire sum of Rs. 120,324.32 (Vide Section 101 of the Evidence Act). This they failed to do by not calling evidence and it was the submission of learned Crown Counsel that the Judge had wrongly placed the burden on the defendant and that the plaintiffs' action should have been dismissed *in limine*. I am inclined to agree with the submission of Counsel that the learned Judge has misdirected himself on the burden of proof and that the plaintiffs have failed to discharge the burden that lay on them to prove their case. Indeed the learned Judge was in serious error when he held in the course of his judgment that " it is not in dispute that the total freight earned by the plaintiff amounted to Rs. 120,304·32 and that the defendant became liable to pay this sum ". There was no such admission on behalf of the defendant—an admission which, if correct, would have entitled the plaintiff to succeed. The defendant only admitted that this sum was payable, *if the plaintiff made right and true delivery*, and the main issue in the case proceeded on the question whether there was any such right and true delivery.

Since the plaintiff relied on the Charter Party "A" to prove their case it is pertinent to consider certain clauses in the contract, which the learned Judge has failed to consider adequately and other clauses which he has not considered at all. Freight was to be paid in transferable sterling in London, 90% three days after breaking bulk and the balance of freight on right and true delivery (Clause 1); notice had to be given to the Shippers agents at Rangoon 'HEILGERS RANGOON' and to 'EASTLINE COLOMBO' (Ceylon Shipping Lines Ltd.) ten days before readiness to load (Clause 5), tallymen at loading port to be appointed and paid for by owners. Tallymen at discharging port to be appointed by Ceylon Shipping Lines Ltd., Colombo, Cable EASTLINE, to attend to all ship's business on Owners behalf, and Master to wireless 'EASTLINE COLOMBO' 48 hours and 24 hours expected time of arrival, Colombo (Clause 28). The Owners are not relieved from liability to deliver the number of bags shipped as shown in the Bills of Lading (Clause 32) and 2½% commission dead freight and demurrage on the freight earned was due to the Ceylon Shipping Lines Ltd., Colombo, for division and 1¼% to Ceylon Shipping Lines (London) Ltd. (Clauses 15). The original Charter Party bears the frank of Ceylon Shipping Lines Ltd., Colombo, and Ceylon Shipping Lines (London) Ltd. These clauses become relevant in considering the nebulous position of the Ceylon Shipping Lines Ltd., Colombo, in regard to this Charter Party and the admissibility of documents written on their behalf on which the Crown relied to disprove the plaintiffs' claim. It was the position of the Crown that the Ceylon Shipping Lines Ltd. were the agents of the shipowners and that the terms of the contract and the documents written on their behalf disclosed a failure on the part of the plaintiffs to establish their case.

Although the plaintiffs led no evidence the defendant led the evidence of an Assistant Food Controller, Muthupulle, to speak to the terms of the Charter Party and a representative of the Ceylon Shipping Lines to prove their connection with this contract. In spite of some confusion in their evidence, probably arising out of their cross-examination on matters remotely relevant to the questions at issue, the following facts have been established on the oral and documentary evidence led on behalf of the Crown.

The agents of the Government of Ceylon at Rangoon were the State Agricultural Marketing Board who were the shippers at the port of loading. Heilgers (Rangoon) as agents of the Ceylon Shipping Lines were responsible for the loading of the rice at Rangoon and have prepared and signed the Bills of Lading D1 to D5 as Agents of the Ceylon Shipping Lines. The Manifest has also been signed by Heilgers (Rangoon) on behalf of the Ceylon Shipping Lines. After the arrival of the vessel at Colombo on 22nd October, the Ceylon Shipping Lines by letter D of 27th October forwarded the Bills of Lading D1 to D5 and the Manifest D6a, signed by their agents at Rangoon, to the Food Commissioner

and according to clause 28 of the contract, referred to earlier, the agents of the Owners at the discharging port were the Ceylon Shipping Lines. The terms of the contract and the documents D1 to D5, D6 and D6a make it abundantly clear that the Ceylon Shipping Lines were the agents of the plaintiffs both at the port of loading and the port of discharge. A faint effort was made by Counsel for the plaintiffs to object to the Bills of Lading because, under the contract the Bills have to be signed by the Master and the Master was not listed as a witness nor was he present in Court to give evidence, but the Bills of Lading were relied upon by the plaintiffs in their plaint in support of their claim for the balance freight and were signed and forwarded by the plaintiffs' agents and consequently were documents that could properly be proved to contain admissions against the plaintiffs. On these documents and the terms of the contract it has been established that the discharge of the cargo was the responsibility of the Ceylon Shipping Lines, as the agents of the owners, and that even the tallymen had to be appointed and paid by the owners (Clause 25). In the circumstances it is idle to suggest that since the stevedoring in the port of Colombo was done by the employees of the Port Cargo Corporation, that the Ceylon Shipping Lines, as agents of the owners, were not responsible for the proper discharge of the cargo. That the Ceylon Shipping Lines had a vital interest in the freight that was earned is supported by the clause that they were entitled to a commission on the dead freight and demurrage earned by the Owners (Clause 15). The terms of the contract and the documentary evidence support the oral testimony of the witnesses called by the Crown—that the Ceylon Shipping Lines were the agents of the plaintiffs at the port of loading and the port of discharge. Perera, the representative of the Ceylon Shipping Lines admitted that this was the case and that Heilgers (Burma) were the agents of his company at Rangoon. It was sought to suggest to Perera in cross-examination that the agents for the shipowners were Messrs Aitken Spence & Co. Ltd., and not the Ceylon Shipping Lines. According to Perera the former were the general Agents of the Company but the Ceylon Shipping Lines were the agents of the owners for the purpose of this Charter Party. The plaintiffs produced P1 and P2 to support the submission that Ceylon Shipping Lines were not their agents. These were letters written by the Ceylon Shipping Lines to Messrs Aitken Spence & Co., Ltd. According to P1 the Food Commissioner, who apparently considered the Ceylon Shipping Lines responsible for the discharge, had written to the Ceylon Shipping Lines, drawing their attention to the 125 bags short delivered. An extract from the Food Commissioner's letter was forwarded by P1 to Messrs Aitken Spence & Co. informing them that the claim from the Food Commissioner would be forwarded to them for "attention and disposal" as the tally was arranged by them. In P2 the Ceylon Shipping Lines again writing to Messrs Aitken Spence & Co. Ltd., seeks to disclaim any liability for the short discharge since the stevedoring was done by the Government of Ceylon as Charterers. I cannot see how P1 and P2 can assist the plaintiffs in the light of the express provision in the

contract that tallymen at the discharging port were to be appointed by the owner's agents, the Ceylon Shipping Lines and subject to the Owner's approval and the claims in the contract which appointed the Ceylon Shipping Lines agents of the owners at the port of discharge. Whether the discharge was at the instance of the Ceylon Shipping Lines or Messrs Aitken Spence & Co. Ltd., the owners of the vessel are responsible for the proper discharge of the cargo. An attempt was also made to suggest that the Ceylon Shipping Lines were the agents of the Food Commissioner for the purpose of Clause 28. Though Perera answered Counsel's question in the affirmative in cross-examination, he corrected himself in re-examination and referred to Clause 14 which provided for the appointment of Brokers or Agents or Stevedores by the Charterer. There is no evidence that the Ceylon Shipping Lines were appointed under this clause by the Food Commissioner.

D11 of 17th November 1959 is a letter sent by the plaintiffs' proctors to the Food Commissioner referring to the Outturn (D 7) and suggesting that there was no basis for withholding the sum of Rs. 5,145 for the number of 125 bags alleged to be short landed. The letter states that the entire cargo was discharged and that the Commissioner has not taken into account 672 bags of sweeping which were delivered. It is significant to note that the plaintiffs' proctor does not take up the position that the missing bags were delivered. Their position at the time D 11 was written was that rice which has seeped through the good bags were collected as sweepings and that therefore there was no shortage in the quantity of rice discharged at Colombo. This position however does not take into account the oral evidence of Muthupulle, the Assistant Food Commissioner, who stated that sweepings were collected into empty gunnies with different markings and could not be reckoned as against the number of bags which according to the Bills of Lading had to be delivered to the consignee at the time of discharge. Even if some of the consigned bags were totally empty they were treated as sound bags for the purposes of the tally. The trial Judge fell into the same error in coming to the conclusion that there was no shortage in the quantity of rice delivered. The Food Commissioner made this position quite clear by his reply to D 11 which is marked D 12 where he states categorically that under Clause 32 the owners are responsible for the physical shortage in the number of bags.

There is finally the Outturn D 8 which has been referred to in D 11. This is a document required to be prepared under the provisions of the Customs Ordinance by the Customs officers, and a certified copy was produced and marked. The trial Judge states that D 7 has not been properly produced as an officer of the Customs has not given evidence of its contents and considers its evidentiary value to be nil. The Judge is clearly wrong as D 7 is a public document and a certified copy can be produced under the provisions of the Evidence Act. D 7 clearly disproves the plaintiffs' claim that the entire consignment of 106,208 bags were delivered since it refers to the discharge of only 106,083 bags

indicating a shortage of 125 bags. D 10 which is the invoice forwarded by the owners for payment refers to the 125 bags alleged to be short discharged and fixes the value of the bags short delivered at the current rate of exchange at Rs. 5,145. There is therefore an admission by the plaintiffs of the value of the 125 bags short delivered.

Before I conclude there is one aspect of the judgment of the learned Judge which merits attention; the Crown sought to justify the deduction of the value of the missing bags from the balance 10% earned as freight by the Owners as there was no "right and true delivery". This was the main issue in the case. On this point the learned trial Judge states:

> "'Right and true' delivery means delivery without delay at a safe berth in a safe port in Ceylon. *Freight is a sum in the nature of rent to be paid for the use and hire of a ship on agreed voyages.* The words 'right and true' delivery do not necessarily mean that the whole cargo originally shipped must be delivered. It could *well have been intended merely to fix the time for payment to be the time of the delivery of such cargo at the port of discharge.* 90% of the freight, without reference to the cargo had to be paid three days after breaking bulk. It may well be that the proper course for the defendant to have adopted was to pay the freight and make a claim in respect of the 125 bags short discharged as set out in P 1."

I am unable to ascertain on what basis the learned trial Judge has come to this conclusion and my researches into the well known text books on Shipping law such as Carver on Carriage of Goods by Sea and Scrutton on Charter Parties and Bills of Lading do not support the Judge's view. Even Counsel, who addressed the Judge at the conclusion of the case, has not subscribed to this view. The payment for freight earned can only refer to the carriage of the cargo to the port of discharge and can never be reckoned in "the nature of rent to be paid for the use and hire of a ship". According to Scrutton (17th Ed. p. 330) "Freight in the ordinary mercantile sense is the reward payable to the carrier for the carriage and arrival of the goods in a merchantable condition ready to be delivered to the merchant", and Carver (9th Ed. p. 804) defines it succintly as "the remuneration payable for the carriage of goods". There is no suggestion of rent for the use and hire of a ship in either of these definitions. Freight, being the remuneration due to the shipowner for the carriage of goods, can only be claimed on due delivery. In this case 90% was payable three days after breaking bulk and the balance 10% on right and true delivery, and obviously, the delivery must relate to the cargo carried. If there was a default on the part of the shipowner, he was not entitled to be paid for the freight to the extent of his default.

In Shipping Law the words "right and true" delivery have been used to indicate the delivery of the goods by weight or quantity depending on the nature of the contract. Thus in *London Transport Co. v.*

Trenchman[1] the freight on a cargo of sugar in bags was to be paid at a certain rate "per ton of 20 cwt. gross weight shipped on *right and true delivery* of the cargo". It was held that this meant on the shipped weight of the cargo delivered. And the freight was calculated on the number of bags which arrived containing sugar at their average weight when shipped, as ascertained from the bills of lading. Although the *ratio decidendi* in the case dealt mainly with the manner in which the weight of the sugar delivered had to be ascertained, it is clear that the words "right and true" delivery applied to the delivery of the cargo. The same words were used in *Howard v. Prinsep*[2] to indicate that they pertained to the delivery of the cargo. Unless the shipowner carries the goods to the destination agreed on and is prepared to deliver his cargo he is not entitled to any part of the freight. I am also at a loss to understand on what basis the learned Judge arrived at the conclusion that these words "could well have been intended merely *to fix the time for payment* to be the time of delivery of the cargo at the port of discharge". The time of payment has no bearing whatsoever on the right and true delivery of the cargo. Had the learned Judge considered the words in their ordinary meaning he could not have failed to come to the conclusion that the words pertained to the delivery of the cargo and nothing else. I am therefore of the view that he has misdirected himself in regard to the interpretation of these words and in the face of the documentary evidence, particularly D 7, he had no alternative but to dismiss the plaintiffs' action.

A considerable part of the judgment dealt with a preliminary point raised by Crown Counsel on the question of jurisdiction. The learned trial Judge after a consideration of the law has held that he had jurisdiction to try the case and characterised the point raised by the Crown as being technical. I am inclined to agree. Nevertheless in the light of the overwhelming admissible evidence led in the case, both oral and documentary, it is impossible to support the order of the learned Judge who entered judgment in favour of the plaintiff. Although the learned Judge has referred to "the amazing lack of proof in the case", that lack of proof is confined to an assessment of the plaintiff's case The defendant has successfully disproved the plaintiff's claim.

For the above reasons, I would allow the appeal and dismiss the plaintiff's action with costs, in appeal and in the Court below.

H. N. G. FERNANDO, C.J.—I agree.

Appeal allowed.

[1] *(1904) 1 K. B. 635.*

[2] *(1808) 10 East. 378.*