Present: Wood Renton A.C.J. and Ennis J.

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THE BANK OF BENGAL *v.* THE JAFFNA TRADING COMPANY.

149—D. C. Colombo, 32,193.

Bill of lading—Rights of holder—English law—Separate action for damages for wrongful sequestration—Civil Procedure Code, s. 659—Estoppel—Agent for collection.

The right of the holder of a bill of lading to the possession of goods to which it relates, and his qualified power to sell such goods, are governed by English and not Roman-Dutch law.

Section 659 of the Civil Procedure Code contains no machinery for the trial of actions for damages; it does not bar a regular suit for damages for wrongful sequestration before judgment.

THE facts are set out in the judgment of the Additional District Judge (L. Maartensz, Esq.):—

The plaintiff bank in this action seeks to recover the sum of Rs. 1,863 as damages sustained by it by reason of the wrongful sequestration by the defendant of a consignment of rice, of which the plaintiff was the endorsee of the bill of lading.

The parties went to trial on the following issues, namely :—

(1) Is the plaintiff a duly incorporated banking corporation ?

(2) Was the bill of lading of the shipment of rice in question endorsed and delivered for value by Govindasamypillai to the plaintiff bank ?

(3) Was the sequestration and detention of the rice under the order in D. C. Colombo, C 31,766, wrongful and unlawful, and if so, what damage, if any, has the plaintiff bank sustained ?

(4) Is the plaintiff bank precluded from claiming damages caused by the sequestration in D. C. 31,766 by the operation of section 659 of the Civil Procedure Code ?

(5) Is the plaintiff bank precluded from claiming for all or any of the items A, B, and C in paragraph 9 of the answer by reason of its having failed to claim the same in D. C. Colombo, 31,766 ?

(7) Did the endorsement of the bill of lading transfer the property covered by the bill to the plaintiff so as to entitle the plaintiff to recover the damages claimed ?

(8) Was the sequestration adverse to and inconsistent with the plaintiff bank's claims to or rights in the rice, and if so, did not the plaintiff bank incur the expense by reason of its failure or neglect to comply with the defendant company's proposal contained in the letter of the defendant company's proctor to the plaintiff bank's proctor of December 10, 1910 ?

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(9) Did the plaintiff bank procure the release of the rice from the sequestration ordered in D. C. Colombo, C 31,766 ?

The shipper of the rice in question was one Banchikal Abichan; he had endorsed the bill of lading in blank and delivered it to Govindasamy. The rice was consigned to Niles, and shipped at Rangoon for transport to Colombo.

Govindasamy endorsed the bill of lading in blank and delivered it to the Rangoon branch of the Bank of Bengal, and the bank paid him Rs. 4,790 annas 15 for the bill of lading. The amount was not paid in cash, but Govindasamy's account was credited with that amount; of this sum, Rs. 4,780 was paid to the shipper Banchikal Abichan on a cheque drawn in his favour by Govindasamy.

The Bank of Bengal specially endorsed the bill of lading to the Bank of Madras, Colombo, and sent it with a bill of exchange drawn against the consignee Niles to the Colombo branch of the Bank of Madras for collection. Niles refused to pay the amount due on the bill of exchange, and it was noted for non-payment on December 3, 1910, and the rice was advertised for sale on December 8.

On November 25 the defendant company filed an action, D. C. Colombo, 31,766, against Govindasamy, and on the same date applied for and obtained a mandate directing the Fiscal to seize and sequester the consignment of rice. On December 6, 1910, the defendant obtained an order authorizing the Fiscal to sell the rice and bring the proceeds into Court.

On December 29, 1910, the Bank of Madras filed a claim to the property sequestered.

On December 30, 1910, the defendant company, without notice to the Bank of Madras, moved for and obtained an order recalling the mandate, and directing the Fiscal to release the rice sequestered.

On January 9, 1913, the Bank of Madras moved that a day be fixed for inquiry.

The application stood over for January 13. No inquiry was necessary, and the Bank of Madras obtained an order for costs on January 13.

As agreed on, I answer the first issue in the affirmative.

The plaintiff bank has proved conclusively that the bill of lading was endorsed and delivered to it for value, and I answer the second issue in the affirmative.

The main objection to plaintiff's claim is raised in issues (7) and (8). The defendant company contends that there is no evidence to show the nature of the contract entered into between Govindasamy and the plaintiff bank, in consequence of which Govindasamy endorsed and delivered the bill of lading to the bank, and that the evidence of Mr. Stephenson, that any surplus remaining over, after the claim of the bank had been satisfied, would be paid to Govindasamy, proved that the goods were only pledged to the bank, and were not sold to it outright.

In support of this contention defendant's counsel cited the case of *Sewell v. Burdick*,[1] in which case it was held that the mere endorsement and delivery of a bill of lading does not pass the property in the goods to the endorsee where it was not the intention of the parties to the transaction that the endorsement should have that effect.

[1] *(1884) 10 A. C. 74.*

Shortly stated, the case for the defence is that Govindasamy had a saleable interest in the consignment of rice, as he had only pledged the rice with the plaintiff bank, and that the defendant company was therefore entitled to sequester the property.

Mr. Drieberg, for the plaintiff bank, contended that Govindasamy had no interest in the rice enforceable against the bank, even if the intention of the parties was to effect only a pledge, and relied on the case of *Sewell v. Burdick*,[1] *Glyn v. E. & W. India Dock Co.*,[2] and *Mirabitta v. The Ottoman Bank*.[3]

In the case of *Sewell v. Bendick*[1] goods were shipped to a foreign port under bills of lading, making the goods deliverable to the shipper or his assigns. After the goods had arrived and been warehoused the shipper endorsed the bills of lading in blank, and deposited them with the endorsees as security for a loan. The endorsees never took possession of or dealt with the goods.

The House of Lords held, reversing the judgment of the Court of Appeal, that "the property in the goods did not pass to the endorsees within the meaning of the Bills of Lading Act so as to make them liable in an action by the shipowner for the freight."

Lord Selborne, in the course of his judgment, after discussing several cases, said: "None of the cases to which I have referred arose upon the statute with which your Lordships have now to deal; they related, some to the right of stoppage *in transitu*, some to competing claims between holders for value of different parts of the same set of bills of lading. It may well be that, as against all such claims, and against parties setting up interests adverse to the title of the endorsee for value, such words as the 'legal ownership,' 'legal right,' 'right of property' might be used, and the property which passed to the endorsee might be described as 'absolute' in a sense substantially true, even though such property might, as between the endorsee receiving and the shipper depositing the bill of lading for collection, be special only and not general; and though the most apt term for a scientific definition of the transaction as between the borrower and the lender may be not assignment or transfer, but pledge."

Lord Blackburn, in discussing the case of *Glyn v. E. & W. India Dock Co.*,[2] quoted from his judgment in that case the following passage: "I do not think it necessary to express any opinion on a question much discussed by Brett L.J. I mean, whether the property which the bankers were to have was the whole legal property in the goods, Cotton & Co.'s interest being equitable only, or whether the bankers were to have a special property as pawnees, Cotton & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to possession subject to the shipowner's lien, and were entitled to maintain an action against any one who, without justification or legal excuse, deprived them of that right." He continued: "All the noble and learned Lords agreed in this. I think, therefore, that the decision of this house is a strong authority in support of the position, that the rights of a mortgagee having taken a bill of lading and the rights of a pawnee having taken a bill of lading are in substance the same."

[1] *(1884) 10 A. C. 74.*

[2] *6 Q. B. D. 480.*

[3] *3 Ex. D. 164.*

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The decision in *Sewell v. Burdick* [1] did not, as far as I can see, affect the right of a pawnee who has taken a bill of lading; he is in the same position as a mortgagee, who undoubtedly has the right of property subject to redemption.

Glyn v. E. & W. India Dock Co.[2] The plaintiffs were the endorsees of a bill of lading, and sued the Dock Company for the value of the goods which the Dock Company had delivered to persons holding delivery orders from the endorsees of the bill of lading. The bill of lading was endorsed to plaintiffs in consideration of a sum of £13,000 advanced on the security of the cargo.

Field J. gave judgment for plaintiffs (*1879, 49 L. J. Q. B. 303*). His judgment was reversed by the Court of Appeal, Brett L.J. dissenting (*1880, 50 L. & Q. B. 62*). Brett and Baggabag L.J. held that the endorsement of the bill of lading gave the plaintiffs the legal property, only reserving to the endorsees an equity of redemption. Bramwell L.J. held that the property did not pass, but that there was a pledge of them with a right of redemption in the endorsees. The passage in his judgment relied on by the plaintiff is the following: "They (plaintiffs) did, however, by the handing over to them of the bill of lading endorsed under the agreement, acquire a special property and right of possession. And I cannot doubt that as against an actual wrongdoer, and against any person who had actually converted the sugar to his own use, or dealt with them under a claim of title, they might have maintained an action such as the present."

In the House of Lords Lord Blackburn held that a mortgagee and pawnee were practically in the same position. Section 514 of the *Laws of England* (*Halsbury's*), *vol. XXII., p. 245*, lays down that where judgment has been obtained against the pawnee of goods and execution issued thereon, the Sheriff cannot seize the goods pawned unless he satisfies the claim of the pawnee. In the case under consideration the rice was sequestered without any attempt to satisfy the debt of the pawnee.

I am of opinion, on the authority of the cases of *Sewell v. Burdick* [1] and *Glyn v. E. & W. India Dock Co.*,[3] that so far as the English law applies the endorsement of the bill of lading transferred the property covered by the bill to the plaintiff so as to entitle the plaintiff to recover the damages claimed.

I am further of opinion that the case is one to which the English law applies. But even if the Roman-Dutch law applied, the goods having been pledged and delivered by the endorsement of the bill of lading, the plaintiff bank would have the same rights over the rice.

I accordingly answer the 7th issue in the affirmative.

I find on the 8th issue that the sequestration was adverse to and inconsistent with plaintiff bank's claim to and rights in the rice.

Another defence set up was that the plaintiff bank could not maintain this action, as it had endorsed the bill of lading to the Bank of Madras. This defence might have been successful, if it had not been held in the case of *Sewell v. Burdick*[1] that the mere endorsement of a bill of lading did not pass the property in the goods to the buyer, but that the effect the endorsement depended on the contract between the parties.

[1] (*1884*) *10 A. C. 74.*

[2] (*1882*) *House of Lords, 52 L. & Q. B. 146.*

[3] *6 Q. B. D. 480.*

It has been conclusively proved that the Bank of Madras were merely the agents of the plaintiff bank, and that the bill of lading and bill of exchange were endorsed to the Madras Bank only for the purposes of collection. The endorsement of the bill of lading did not, therefore, pass the property in the goods, and the sequestration of the goods was not a violation of the rights of the Madras Bank, and I am of opinion that the plaintiff bank was the proper party to bring the action, and that the action is maintainable.

The 4th and 5th issues practically raise the same objection, viz., that the damages should have been claimed in the case No. 31,766 of this Court, in which the mandate issued.

There was, however, in case No. 31,766 no investigation of the claim made by the Madras Bank on behalf of the plaintiff bank; the sequestration was withdrawn without any notice to the claimant, and the claimant had no opportunity of proving either title or damages.

As a matter of fact, the Bank of Madras had no authority to claim the rice, and if the claim had been investigated, it was bound to fail for want of title to the rice in question.

In the circumstances the plaintiff bank cannot be affected by any action on the part of the Bank of Madras in case No. 31,766.

I am of opinion, therefore, that issues 4 and 5 must be answered in the negative.

As regards the amount of damages, the plaintiff claims only the extra warehouse rent which had to be paid owing to its not being able to sell the property as soon as possible owing to the sequestration.

The plaintiff bank restricted its claim to damages under this head, which admittedly amounts to Rs. 1,135·84 if the bank is entitled to charge for warehouse rent up to December 30, 1910, the date on which the mandate was recalled.

The defendant seeks to restrict the amount of damages to rent up to December 10 on account of the refusal of Messrs. F. J. & G. de Saram to agree to a sale of the rice by the Fiscal.

The defendant's proctor on December 10 wrote to Messrs. F. J. & G. de Saram refusing to release the sequestration, and suggesting that the rice should be sold by the Fiscal, and the proceeds brought into Court to the credit of case No. 31,766 to abide the orders of the Court.

The Bank of Madras could not have acceded to this proposal, as it ran the risk of destroying the rights vested in the plaintiff as pawnee of the rice. Further, a sale by the Fiscal is, as a rule, less successful than a private sale, and there is absolutely no reason why the Madras Bank should have agreed to an arrangement which might have been prejudicial to the plaintiff bank.

I am of opinion, accordingly, that the defendant company is not entitled to a reduction of damages on the ground put forward.

I answer the 3rd issue, which includes issues 7 and 8, in the affirmative. There appears to me to be no merits in the defence; the rice in question was consigned to Niles. Niles is the manager of the defendant company, and I have little doubt that the rice was intended for the company. Niles, instead of accepting the bill of exchange, sought to recover a debt due from Govindasamy to the company by a sequestration of the very goods consigned to him.

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I give plaintiff judgment for Rs. 1,135·84 and costs. The amount to which the plaintiff would have been entitled to recover up to December 10 was to be agreed on and the amount mentioned to the Court. This has not been done. In case of an appeal a statement should be filed of the amount agreed on before the record is forwarded to the Supreme Court.

I find that I have overlooked the 9th issue. I must confess that I do not understand the object of the issue, nor was any argument based on it. It is extremely vague and difficult to answer.

Treating the Bank of Madras as agent of the plaintiff bank, and assuming that the claim made by the Bank of Madras caused the defendant to recall the mandate, it may be said that the plaintiff bank procured the release of the seizure.

But, on the other hand, the defendant's proctor refused to release the seizure when requested by the letter dated December 6, 1910; and on the evidence before me there is nothing to show that any act of the plaintiff bank was the direct cause of the release of the seizure. I accordingly answer the 9th issue in the negative.

H. J. C. Pereira, *Elliott*, and *Gurusamy*, for defendant, appellant.

Allan Drieberg, for the plaintiff, respondent.

Cur. adv. vult.

July 8, 1913. Wood Renton A.C.J.—

The facts in this case have been fully explained by the learned District Judge, and I propose to accept his statement of them for the purposes of the present judgment. The respondent's counsel admitted that the position of the Bank of Bengal in the present case as regards the rice shipped under the bill of lading endorsed over to it by Govindasamy may fairly be described as that of a pledge with a right to possession and to certain powers of sale if the bill of exchange drawn against Niles, the consignee of the rice, was not met, when due, by Niles. The appellant's counsel, on his side, admitted that under the English law merchant the pledgor under such circumstances would have a right to the possession of the rice and a qualified power of sale. But he suggested that in matters of this kind, raising as they do questions of the mortgage or pledge of movables, Roman-Dutch law and not the English law merchant should be applied, and contended that in any case, since the Bank of Bengal had not intervened in the claim proceedings instituted by its agent, the Bank of Madras, on the sequestration of the rice under Chapter XLVII. of the Civil Procedure Code at the instance of the appellant, the Jaffna Trading Company, it was barred now from setting up a claim to damages, which, under section 659 of the Civil Procedure Code, could have been, and ought to have been, put forward in the claim proceedings. He argued further that the Bank of Bengal had, through its proctors, acted in such a way as to estop itself from now putting forward any claim to damages, altogether apart from the objection to such a claim under section 659 of the Code.

After the best consideration that I have been able to give to the subject, I cannot accept any of these contentions. The right of the holder of a bill of lading to the possession of the goods to which it relates, and his qualified power to sell such goods, are, in my opinion, matters of substantive and not of adjective law. By virtue, therefore, of section 1 of Ordinance No. 5 of 1852, section 1 of Ordinance No. 22 of 1866, and sections 2 and 7 of Ordinance No. 8 of 1871, they are governed by English and not by Roman-Dutch law. A decision in a contrary sense would, I am sure, create widespread consternation among banking companies, shipowners, and merchants in Ceylon. The language of the enactments above referred to places the matter, I think, beyond all doubt. The Bank of Bengal, therefore, as pledgee of the bill of lading, had a right to the possession of the rice, and a right to sell it if the bill of exchange, drawn against the advance to Govindasamy, were dishonoured by Niles. I am unable to hold that, even if the rights of the Bank of Bengal under the bill of lading passed by endorsement to the Bank of Madras, the former would be precluded by anything in Chapter XLVII. from bringing an independent action for the recovery of damages caused by a wrongful sequestration. Section 659 contains no machinery for the trial of actions for damages. The intention of the Legislature clearly is that claims in sequestration proceedings should be summarily disposed of. Such a demand for damages as the Bank of Bengal seeks to enforce in the present case could not be adequately investigated without the filing of pleadings, the framing of issues, and the examination of witnesses. Can it be seriously argued that the Legislature intended that this should be done in the course of summary proceedings with a view to the removal of a sequestration of property? Moreover, Chapter XLVII. of the Code contemplates arrest of the person as well as of the property. If the appellant's contention in regard to the scope of that chapter is correct, I see no reason why a defendant, who has been unlawfully arrested, should not be forced to prefer his claim to damages under Chapter XLVII. on pain of finding himself debarred from his remedy altogether. This view of the scope of section 659 is confirmed to some extent by the decision of Sundara Aiyar J. and Phillips J. in *Manjappar Chettia v. Canapathi Gounden*,[1] to which Mr. Hector Jayewardene kindly called our attention as *amicus curiæ*. It was there held that section 95 of the new Indian Code of Civil Procedure, which corresponds to section 659 of our own Code, is no bar to a regular suit for damages for wrongful attachment before judgment.

I am of opinion, however, both on the evidence and on the law, that the rights of the Bank of Bengal, as pledgee of the bill of lading, did not pass to the Bank of Madras, in view of the facts that the endorsement by the former bank in favour of the latter was made

[1] *21 Mad. L. J. 1952.*

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without consideration, and that the Bank of Madras received the bill of lading, and the bill of exchange accompanying it, merely as agent for collection. On this point I would refer to the case of *Burgos v. Nascimento*.[1]

It remains to consider the argument as to estoppel. The appellant's contention on this point is that the Bank of Bengal held out the Bank of Madras as its plenary agent in the claim proceedings, and that the appellant's sequestration was withdrawn on the footing that no claim for damages would be preferred. It is suggested that the appellant's proctor was misled by the inaccurate statement, admittedly made in perfect good faith by the proctors for the Bank of Bengal in their letter D 5, dated December 6, 1910, that the Bank of Madras was holder for value of the bill of exchange, coupled with the statement in the claim proceedings that the claim was made by the Bank of Madras as " holder of the bill of lading and the bill of exchange drawn against the rice." There is no evidence in the record showing that the sequestration was withdrawn on the ground that no claim for damages was put forward. In the letter D 5 the proctors for the Bank of Bengal expressly stated that the property in the goods had passed to the Bank of Bengal, and that, therefore, their seizure as the property of the defendant was illegal. In his reply to letter D 5 the appellant's proctor says: " I am advised that the mere endorsement of the bill of lading does not pass the property in the goods to the Bank of Bengal, and the property therefore being still the property of the defendant has been rightly sequestered." In view of the statements in these two letters, and of the fact that Niles was manager of the Jaffna Trading Company, and must have known the whole circumstances of the transaction, this plea of estoppel fails. I should perhaps add that I am unable to interpret the statements, made in cross-examination, by Mr. Stevenson, the Accountant of the Rangoon branch of the Bank of Bengal, that " the Bank of Madras must have kept their bank informed of the sequestration," and that they " had the sanction of the Bank of Bengal for all that they did," as sufficient to create any estoppel.

I would dismiss the appeal with costs.

ENNIS J.—I entirely agree.

Appeal dismissed.

[1] (*1908*) *Weekly Notes 1908, 237.*