1954 *Present :* **Gratiaen J. and Fernando A. J.**

H. ALIBHOY, Appellant, *and* CEYLON WHARFAGE Co., LTD., Respondent

S. C. 51—D. C. Colombo, 22,279

Carrier by trade—Action for failure to deliver goods—Quantum of proof necessary— Vis major—*" Boat note "—Customs Ordinance, s. 40.*

Plaintiff sued defendant, a Company carrying on the business of landing and shipping of goods in the Port of Colombo, for their failure to deliver to the plaintiff a consignment of 436 bags of beans—each bag bearing the identifying mark " I.O.T.C. "—alleged to have been consigned to the plaintiff on the s. s. " June Crest " which arrived at the Port of Colombo.

Held, that before the plaintiff could claim damages from the defendant for loss or non-delivery of goods, he had to prove that 436 bags bearing the identifying mark " I.O.T.C. " were actually delivered out to the defendant at the ship's side.

Held further, that in the absence of proof of negligence, the defendant, as carrier, was not liable to deliver the goods in good condition. In order to establish that the goods had deteriorated through negligence on the part of the defendant, the plaintiff should have tendered evidence of the sound condition of the goods at the time of the consignment and of the improbability of deterioration during transit.

A carrier's obligations towards a consignee discussed.

APPEAL from a judgment of the District Court, Colombo.

V. A. Kandiah, with *G. F. Sethukavalar*, for the plaintiff appellant.

S. J. V. Chelvanayakam, Q.C., with *P. Navaratnarajah*, and *V. Ratnasabapathy*, for the defendant respondent.

Cur. adv. vult.

June 30, 1954. FERNANDO A.J.—

The plaintiff in this action sued the defendant—a Company carrying on the business of the landing and shipping of goods in the Port of Colombo—for their failure to deliver to the plaintiff a consignment of 436 bags of beans alleged to have been consigned to the plaintiff on the s.s. " June Crest " which arrived at the Port of Colombo on January 13, 1947.

I shall assume (the learned District Judge has also done so) that the obligation owed by the defendant Company to the plaintiff is the same as that which was held in *Bagsoobhoy v. Ceylon Wharfage Co., Ltd*[1] to be owed by the same Company to a consignee of goods. Basnayake J. (at p.152) there defined the obligation in the following terms : " *Upon proof of receipt of the goods by the carrier* and their loss or non-delivery to

[1] *(1948) 49 N. L. R. 145.*

the consignee, the carrier is liable, unless he can bring himself within the exceptions (of *vis major* or *damnun fatale*), the onus of proof being on him. The exceptions are not a valid defence when they have been brought about by the carrier's negligence ".

The principal question which accordingly arose for determination is whether the plaintiff has proved that the consignment of 436 bags bearing the plaintiff's mark " I.O.T.C. " was actually delivered to the defendant at the ship's side. The plaintiff has produced a certified copy of the ship's manifest and two bills of lading P1 and P2 which would clearly establish, *as against the owners or charterers* of the vessel, that 436 bags of beans marked I.O.T.C. consigned to him had been taken on board the " June Crest " at Mombasa. He has also proved that the entire cargo taken on board at Mombasa was consigned to Colombo, which was the first port of call, and that the defendant Company, upon directions from the Port Controller, did receive and land the entire ship's cargo.

On these facts it is argued for the plaintiff that he has proved that 436 bags of beans bearing the mark I.O.T.C. were received by the defendant and that an obligation of the nature defined therefore arose. The case for the defendant Company is that the evidence was insufficient to establish, *as against the Company*, that such bags were actually received, and their case is supported by the following circumstances. The shipper of the goods has not testified to the fact that the bags were duly marked as requested by the consignee. There is no evidence, from the ship's agents, either at Mombasa or at Colombo, that bags *bearing those marks* were received on board or delivered out. The boat notes covering the discharged cargo do not identify the bags by reference to markings (as s. 40 of the Customs Ordinance requires), but only refer to the markings as " various "; the learned Judge has rightly accepted the evidence that the requirement of entering the precise markings on boat notes is not ordinarily observed in regard to cargoes of grain.

I agree with the learned Judge that the ship's manifest and the bills of lading do not constitute evidence, *as against the defendant Company*, that the consignment of 436 bags did actually bear the markings I.O.T.C., and that the Company cannot therefore be held liable to deliver the full quantity of bags *with those markings*. The Company did actually tender delivery of 436 bags out of the quantity remaining unclaimed by other consignees, but the plaintiff declined to accept that tender.

The learned District Judge has decided upon the evidence that the defendant Company did receive at the ship's side 145 bags consigned to the plaintiff and bearing the relevant marks, that this quantity was actually landed on shore, and that the Company failed and neglected to deliver this quantity to the plaintiff. He has held that the Company is liable to pay to the plaintiff the value of the 145 bags which he fixes at Rs. 52 per bag on the basis of the landed cost. In regard however to 60 bags out of that quantity he has fixed damages at a rate equal to 75 per cent. of the value, on the ground that the Company tendered delivery of 60 marked bags which if accepted by the plaintiff could have realised 25 per cent of the landed cost. In regard to these 60 bags, he

has found that the plaintiff was not bound to accept them because their contents " had nearly perished ", a circumstance for which he was of opinion that the Company must accept liability.

The plaintiff has appealed against the judgment on the ground that his claim in respect of the total consignment of 436 bags should have been allowed. The defendant Company in its cross-objections maintains that the plaintiff's action should have been dismissed, and that in any event there was no proof that more than 60 " marked " bags of the consignment were received by them at the ship's side ; the defendant also denies liability for the alleged " deteriorated condition " of the contents of the 60 bags.

For the reasons already stated, the appeal of the plaintiff must fail, and I have now to consider only the cross-objections raised by the defendant.

The plaintiff himself was absent from Ceylon for part of the period between the arrival and departure of the ship and his interests were being represented by Messrs. Heptulabhoy and Co. One Mohamed Ali, an attorney of that firm, gave evidence to the effect that about 4th February, 1947, he saw a stack of bags bearing I.O.T.C. marks at the Customs Warehouse, that the stack contained about 200 bags, that from droppings on the floor he identified them as containing *Kaffir* beans which was the description of the beans alleged to have been consigned to the plaintiff, and that he took a sample of the beans from the bags. Mohamed Ali also said that he thereafter filled up a bill of entry P 28 which does include reference to the bills of lading P 1 and P 2 covering the plaintiff's consignment. The learned Judge does not accept this evidence as proving that 200 marked bags were actually on the wharf, but he relies on it to support his ultimate conclusion that 145 marked bags were actually received by the defendant. In my opinion it was quite unsafe to rely on Mohamed Ali's evidence on this point. He has not explained why it was that if he saw 200 of the bags and therefore passed the entry for the consignment, he failed to take early delivery of what was available and thus to avoid heavy warehouse charges : he does not even allege that he asked the defendant to give delivery of the part consignment ; nor is there any evidence that he informed either the plaintiff (who returned to Ceylon on February 6th to attend to this very matter) or the defendant that he had seen the 200 bags at the warehouse. His evidence is also inconsistent with the letter (P 6) written by Heptulabhoy and Co. on 8th February in which they complain that " the goods have not been stacked according to marks " and with the plaintiff's statement in his letter P 7 of the 24th February that " I have made all possible efforts to trace the above at the Customs Warehouse, but I have not been able to locate same ". The only reliable inference which can be drawn from these two letters is that their writers were not informed by Mohamed Ali of what he professes to have seen on February 4th.

The ground upon which the learned Judge has relied for his finding that 145 of the marked bags were received by the defendant makes it necessary to refer to the practice of Customs officers in regard to the levy of customs duty on consignments like the one in question. Mr. Subramaniam who

was Registrar of Customs at the relevant time deposed to the fact that the duty on a particular consignment is assessed only after at least one-third of the consignment has been landed ; that for this purpose the quantity landed is stacked together according to marks ; that a test weighing of two bags taken from the stack is made in order to assess the weight of the whole consignment ; and that the test weight is recorded on the back of the consignee's entry as well as in a " Blue Book ". Mr. Pullenayagam, the Landing Waiter, whose initials appear below the test weight recording in the bill of entry P 28, gave evidence to the same effect. He was sure that one-third of the total consignment covered by the entry for these 436 bags *must have been landed and stacked by reference to marks* at the time when he made the test for the weight recorded by him. Pullenayagam was however not able to recall the actual occasion or to speak directly to the fact that about one-third of the bags had actually been stacked together or that he actually examined a stack of marked bags. It is on this evidence, together with Mohamed Ali's story about the 200 bags, that the learned Judge found that the receipt by the defendant of 145 marked bags (1/3 of the total of 436) has been proved. In my opinion, the presumption *omnia rite esse acta*, which would ordinarily justify such a finding on such evidence, is not applicable in this case owing to the existence of special circumstances to which I shall refer immediately.

There was apparently in the Port of Colombo at the time when the " June Crest " was in harbour severe congestion both of shipping and of cargo ; so much so that the Port Priority Committee on 27th January decided " to stockpile the cargo " from the " June Crest " i.e., to stack without reference to markings, and to advertise the sale of one consignee's cargo in order to make other consignees clear their cargo without delay, and on 5th February even contemplated special legislation to reduce the time limit for clearance of goods ; and on 30th January the Chairman of the Port Commission " beacause of the slow clearance from the harbour premises " authorised the Landing Companies discharging from the " June Crest " and one other ship to charge consignees treble the normal landing rates. The Assistant Manager of the defendant Company, a witness whose evidence was referred to by the plaintiff's Counsel as being entirely reliable, stated that after the decision of 27th January, the cargo from the " June Crest " was to his knowledge stockpiled without reference to marks, and the defendant's Warehouse Superintendent made a similar statement, so that there was clear evidence to the effect that after that day the markings were ignored for stacking purposes. The relevance of this evidence upon the question whether the normal Customs practice was actually followed in this instance appears to have escaped the attention of the learned Judge, and I do not imagine that he would have expressly disbelieved the Company's two witnesses on this point. In the face therefore of positive evidence that stacking by marks had ceased on 27th January, I am of opinion that it was not justifiable to rely on an inference to the contrary which is all that the evidence of the Customs officers affords. Even as to them, this opinion does not involve a disbelief of their evidence. They only speak to the normal practice of stacking by marks before the first weighing, a requirement which might reasonably have been relaxed by them having regard to the severe congestion particularly

affecting the "June Crest's" cargo and to the fact that Customs duty was leviable on all the consignments (totalling some 50,000 bags) at the identical rate. In these circumstances, identification of markings and contents of the bags was of no real importance for Customs purposes. Moreover, the inference that at least 145 I.O.T.C. marked bags must have been passed by the Customs officers is contradicted by the unexplained failure of Heptulabhoy and Co. to remove that part of the consignment which upon that inference must have been ready and available for delivery on 4th February. I think for these reasons that the finding that 145 marked bags were actually delivered to the defendant's Company cannot be maintained.

It follows that, out of the total quantity of the 436 bags which the defendant Company is alleged to have received from the "June Crest", the only bags proved to have borne the markings I.O.T.C. were the 60 bags traced by the Company and tendered for delivery to the plaintiff. In regard to these, the learned Judge held that the plaintiff cannot be compelled to accept them "because their contents had nearly perished", but in respect of them he allowed the plaintiff only 75 per cent. of their value on the ground that if accepted the plaintiff could have realised about 25 per cent. of their value. The bags were apparently infected with weavils, a circumstance attributed by the plaintiff to the fact that they were found stacked with other weavil infected bags. The question which has here to be decided is whether the defendant Company is liable for the alleged deterioration in the contents of the 60 bags.

The principle laid down by Basnayake J. in *Bagsoobhoy v. Ceylon Wharfage Co., Ltd.* (supra) does not impose on the defendant Company an absolute liability to deliver the goods *in good condition*, and only renders the Company liable for *loss or non-delivery*. In order to establish that the goods had deteriorated through the negligence on the part of the defendant Company, the plaintiff should have tendered evidence of the sound condition of the goods at the time of the consignment and of the improbability of deterioration during transit. Even in an action against the ship owner, the production of the manifest and bills of lading would not to my mind avoid the necessity of evidence of this description. In the absence of such evidence, as well as of other evidence in proof of negligence as having caused the deterioration, the defendant Company cannot be held responsible for the actual condition at the time of tender. Even the vague suggestion, if accepted, that the bags became contaminated by contact with the other infected bags is insufficient evidence of the defendant's negligence, since there is nothing to rebut the possibility that the other infected bags themselves formed part of the plaintiff's own consignment.

I am of opinion that the defendant Company duly carried out its obligation to the plaintiff by tendering delivery of the 60 marked ones which had been traced, and is not therefore liable for any damage suffered by the plaintiff in consequence of his refusal of the tender.

The plaintiff's appeal is dismissed with costs. The cross-appeal of the defendant Company is allowed and plaintiff's action is dismissed with costs.

GRATIAEN J.—

The facts relevant to this appeal are set out in the judgment of my brother Fernando, with whose conclusion I am in complete agreement. I desire only to make some reference to the legal issues which generally arise in cases of this kind.

It is necessary to analyse the obligation which the company undertook when it was entrusted by the Port Controller with the duty of discharging cargo from s.s. "June Crest" on the arrival of the vessel in Colombo. Abnormal conditions were admittedly prevailing in the port, and a carrier would have found it quite impossible to identify each consignment of the cargo (by reference to the relative shipping documents) as and when it was being passed over the ship's side into lighters. This responsibility was not imposed on the Company by the directions of the Port Controller or by the terms of any contract (express or implied) between the Company and either the owners of the ship or the consignees of the cargo. Some reference has been made to section 40 of the Customs Ordinance which provides that each "boat note" must specify "the marks or other description" of each package unladen from a ship. This requirement was admittedly not meticulously observed. Indeed, it could not have been, without disorganizing completely the work which the Controller required to be carried out as expeditiously as possible in the public interest. It is sufficient to say that even if a carrier's failure to observe this requirement might have constituted a technical breach of the statute, it has no bearing on the question of his civil liability.

The obligations in fact imposed on the company were :

(1) to receive all cargo actually discharged into lighters from the vessel ;

(2) to transport this cargo, as quickly as was practicable, to such of the Queen's warehouses as were allocated for the purpose ;

(3) in due course to deliver at the warehouse to each particular consignee any part of the cargo which could be identified (by reference to the relative documents) as his property provided that the Customs dues and the company's landing charges (at rates fixed by the Controller) were first paid.

What then was the standard of care towards a particular consignee which this particular situation demanded of the company from the time when the cargo was received into the lighters ?

A Bench of two Judges has decided in *Baysoobhoy's case*[1] that the Roman-Dutch law applied to a case of this kind. We are bound by that ruling. Accordingly, the liability of a carrier by trade (unless enlarged by contract) is not quite so wide when goods are being conveyed in lighters as in the case of a common carrier in England, but is very similar for all practical purposes. He is not an insurer of the goods entrusted to him for carriage ; nevertheless he is liable for their loss or deterioration while in his custody unless he can prove that it was occasioned by *vis major* or *dam-*

[1] *(1918) 49 N. L. R. 145.*

num fatale—see *Voet 4. 9. 2.* and *Treglida & Co., v. Sievright* [1]. In other words, the onus is on him to establish that he had taken all due care and not been negligent "—*Fumba v. Dickenson* [2].

It might be asked what, under modern conditions, would constitute *vis major* so as to relieve a carrier by trade of liability. The answer is that this term is not necessarily restricted to " an act of God " or to the consequences of piracy, ship-wreck, thunder, lightning, or hostile action by the Queen's enemies. It is sufficient for the carrier to rebut the initial presumption of negligence (which the law imputes to him) by proving that the loss or deterioration of the goods resulted from some cause which was " utterly beyond his power to prevent "—*per* Buchanan A.C.J. in *Magaga v. Cole* [3]. The standard of care demanded of a carrier by trade is *exacta diligentia* so that he is exempt from liability only if the loss was " purely fortuitous and due to inevitable accident "—*Postmaster-General v. van Niekerk* [4]. It is a question of fact whether *exacta diligentia* was exercised in any particular case.

The origin of a carrier's obligation towards a consignee can in appropriate case be traced to the express or implied terms of contract entered into between them (the consignor being the agent to make it)—*Cork Distilleries Co. v. Great Southern and Western Rly. Co.* [5] which was applied by Jayatilleke J. to the facts which arose in *Cunji Moosa v. City Cargo Boat Co.* [6]. But I find it difficult to read an implied contract into a transaction where, as here, the Port Controller, exercising special powers under Emergency Regulations, himself selects a particular carrier to handle cargo discharged from a vessel in the port and in due course to distribute it between various consignees to whom the carrier must look for payment. In such a situation the duty to exercise *exacta diligentia* is equally imposed, but it seems more logical to trace the obligation to " a peculiar incident of the law relating to carriers " than to the legal fiction of an implied promise. *Wessels on Contract, Vol. 1, para. 258.*

Let us also examine the obligations of a carrier in this and similar situations where the goods, having been landed into the Queen's warehouses, are awaiting delivery to the consignees. If, at any time during this period, the goods are exclusively within the control of the Customs authorities, the carrier's responsibility is for the time being at an end. *Asana Marikar v. Livera* [7] and *Athinarayanapillai v. Ceylon Wharfage Co. Ltd.* [8] If, on the other hand, they remain under the carrier's control *as a bailee or custodian for hire*, the same duty of *exacta diligentia* is imposed on him as when he was actually transporting the goods—*Cunji Moosa's case* (supra), and *Bagsoobhoy's case* (supra). Unless the matter is regulated by special agreement the question as to who was in effective control of the goods at the time of their loss or deterioration is always the deciding factor.

Turning now to the case immediately under consideration every bag of grain discharged from the ship into the company's lighters has been accounted for. The plaintiff was unable to prove, *as against the company*, that the cargo discharged from the vessel in fact included 436 bags bearing

[1] *(1897) 14 S. C. 76.*
[2] *(1906) 23 S. C. 180.*
[3] *(1908) 25 S. C. 434.*
[4] *(1918) C. P. D. 378.*
[5] *(1878) 7 H. L. C. 269*
[6] *(1947) 49 N. L. R. 35.*
[7] *(1903) 7 N. L. R. 158.*
[8] *(1952) 53 N. L. R. 419.*

the identifying marks " I.O.T.C. " (consigned under the bills of lading P 1 and P 2) in addition to a number of other bags bearing similar marks (consigned to him under P 3 and P 4 and taken delivery of from the warehouses on or before 27th January, 1947, by their purchasers for value). The shipowner's acknowledgments contained in the bills of lading P 1, P 2, P 3 and P 4 are certainly evidence against them, but they do not bind the company. The documents produced in the case prove that out of the entire cargo actually landed into lighters, every bag which was proved to have borne the identifying mark " I.O.T.C. " has been accounted for. Out of these, 60 bags were eventually traced and made available for delivery to the plaintiff against the bills of lading P 1 and P 2. His refusal to accept them discharged the company from any further liability towards him in respect of them.

The question remains whether the plaintiff is entitled even to claim damages from the company for the alleged deterioration of the contents of these 60 bags between the date on which they were discharged into the company's lighters and the date on which they were eventually tendered to him. The answer is clearly in the negative. There is no evidence of any kind as to the condition of the grain in these bags when they came into the company's custody, and it is therefore impossible to assess the extent of their subsequent deterioration (if any). That there must have been some deterioration during this latter is, I concede, extremely probable. But the chaotic conditions prevailing in the harbour and in the warehouse during the relevant period were the effective causes of the delay in tracing them and of their consequent deterioration. These were circumstances which were "utterly beyond (the company's) power to prevent "—*Fumba's case* (supra).

For these reasons, I agree to the order proposed by my brother Fernando.

Appeal dismissed.
Cross-appeal allowed.