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Present: Bertram C.J. and De Sampayo J.

SOMASUNDERAM *v.* SELVANAYAGAM *et al.*

310—D. C. Jaffna, 15,326

Charter party—Agreement to hire ship for taking paddy from Akyab to Jaffna. If no license was given, agreement to ship paddy from Akyab to Paumban—Advance given—Action to recover advance when ship was not hired.

Respondents agreed to charter to plaintiff a sailing vessel for shipping paddy from Akyab to Jaffna at a specified rate per bag; and plaintiff advanced Rs. 1,700, which sum was to be deducted from the freight. If the Government of India did not grant license to export paddy to Jaffna, it was agreed that paddy should be shipped to Paumban. The export of paddy to Jaffna was prohibited by Government, and plaintiff alleged that he was unable to get permission to export paddy to Paumban. He sued for the recovery of the money advanced. The defendant claimed in reconvention damages for breach of contract.

Held, that plaintiff was not entitled to recover the advance, and that defendant was not entitled to recover anything in respect of the breach.

THE facts of this case are as follows:—

It was agreed between the parties that the respondents should charter to the plaintiff-appellant a sailing vessel called "Meera Mohiedeen Sammadhany Hydroos," in order that the charterer, the appellant, might ship paddy from Akyab to the ports in Jaffna.

It was further agreed by the charter party that of this sum of Rs. 1,700, Rs. 800 should be credited to the first trip and Rs. 900 for the second trip. It was also agreed that 2,800 bags should be transported in the first trip and 2,700 bags in the second trip, and that the freight chargeable was Re. 1 13/17 per bag.

The charter party further stipulated that if providentially the Government did not grant license to load and remove paddy from India to Jaffna, then, that both parties should arrive at a settlement regarding the transport of cargo from Akyab to Paumban.

In January, 1920, during the season when paddy is shipped from Akyab to Ceylon, the system of paddy control by the Government of India came into operation, and licenses to ship paddy by private sailing vessels were refused.

Plaintiff alleged that certain Chetty firms on behalf of the general trading community of Chetties inquired from the Director of Civil Supplies of Madras, whether paddy could be transported by sailing vessels from Akyab to the South Indian ports, viz., Paumban and other adjoining ports, and the replies were received that licenses were not given.

Under these circumstances the plaintiff-appellant was unable to ship paddy from Akyab, and, therefore, claimed from the defendants-respondents the sum of Rs. 1,700 which had been advanced to them, and on the respondents refusing to return the said sum of money, the appellant sued them for the recovery of the sum. The defendants-respondents pleaded by their answer that they were not liable to refund the said sum of money, and claimed in reconvention a sum of Rs. 1,275, which they said was the difference between the freight which the respondents expected to earn from the appellant and the freight which they earned from the Indian Government by transporting paddy from them about that period.

The case proceeded to trail on the following issues:—

(1) Of the advance of Rs. 1,700, was Rs. 800 to be appropriated to the first trip and Rs. 900 for the second trip?

(2) Was the charter party to take effect at Akyab, if not, where?

(3) Were plaintiffs unable for causes beyond their control to ship paddy as agreed?

(4) When the charter party was entered, was it in the contemplation of parties that licenses to ship might be refused?

(5) Was license available to ship paddy to South Indian ports?

(6) Even if license was available, does the charter party have a final agreement regarding transporting paddy to South Indian ports, or has it a final agreement regarding Jaffna ports only?

(7) Are the defendants liable to return to plaintiffs Rs. 1,700 advanced, or any portion thereof, if so, how much?

(8) Is plaintiff liable to pay defendant Rs. 1,275 or any amount?

(9) Did the Indian Government prevent export of paddy to ports in Southern India? If so, did the plaintiff apprise the defendant of it before the vessel left Rangoon, and was the agreement cancelled? Even if he did, is he not still liable to pay balance freight due?

(10) Was it in the contemplation of the parties, that license would be refused to export paddy to South Indian ports?

(11) Is it competent to the plaintiff to adduce oral evidence to vary the charter party?

The District Judge (G. W. Woodhouse, Esq.) dismissed plaintiff's action, with costs, and entered judgment for defendant.

The following is the concluding portion of the judgment of the District Judge:—

This charter party was entered into at a time when there was scarcity of rice in Ceylon, and there was difficulty about getting consignments of paddy and rice from Burma. It was feared that the Indian Government would prevent the exportation of paddy to Ceylon. Hence it is that the parties inserted in the charter party the further agreement that if, by reason of the Government not granting licenses to export paddy to Ceylon, the vessel could not be loaded in Akyab for Jaffna, the charterers shall ship paddy to ports of South India no further than Paumban.

I do not agree with plaintiff's counsel that here was no definite agreement that, failing Jaffna, the voyages were to be made to South Indian ports. No doubt the details as to freight, quantity, number of

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voyages, &c., would have to be arranged when the contingency arose, but these could all have been done at Akyab between plaintiff's agent and the master, or between plaintiff and the defendants who could have used the telegraph for the purpose.

I hold that it was in the contemplation of the parties that if Government refused licenses to ship to Jaffna, then the charterers were to load for South Indian ports. As to whether the plaintiff was prevented from shipping to South Indian ports also, I shall consider later.

It seems that if no licenses were granted by the Government to carry paddy by sailing vessels from Akyab, either to the ports of Jaffna or to any port in South India, and it was impossible for the plaintiff to load paddy, or the defendants' vessel to leave the port with the paddy if loaded, the contract is dissolved (*cf.* the finding of the Court of Appeal in *Cunningham v. Dun.*[1]) It is perfectly clear that the plaintiff's object was to get their consignments of paddy to Jaffna.

There was money in it, if he could do so. Even after he was apprised of the fact that no licenses were being issued for Jaffna, plaintiff kept urging the defendants to make their master load the paddy, which plaintiff's agent had bought and had ready at Akyab to be shipped.

It is admitted now, that no shipments were allowed to Jaffna. Both parties were aware of the fact directly the vessel arrived at Akyab. It would seem that plaintiff was waiting for something to happen which would remove the prohibition. Otherwise there was no reason why the plaintiff should not at once have loaded for Paumban.

The evidence, shows that a limited number of licenses, at any rate, were allowed to South Indian ports. Plaintiff appears to have waited until it was too late; and then he was refused a license when he asked for it.

Now the rule as to this is that if the charterer fails to load within the stipulated time, or if there is no stipulated time, then within a reasonable time, the master may sail home again (*Bradford v. Williams*),[2] and if he does so, no claim for damages on the charterer's part arises, but the party claiming damages must take such steps as may be reasonable to diminish the damages, and cannot recover in so far as his damages are inflamed by his own unreasonable conduct *Bradford v. Williams* (*supra*). I think the shipowner was justified in waiting as long as he did, although it was certain at the time the vessel put into Akyab that licenses would not be issued to sailing vessels to carry paddy to Jaffna, there was a chance of the prohibition being removed. Moreover, the charterer had agreed that, failing Jaffna, he would load for South Indian ports, not further than Paumban.

Had the master sought other employment at that time, it would have had the effect of exonerating the charterer and dissolving the contract. He appears to have waited until it became certain that the charterer could not load either for Jaffna or for the South Indian ports. He then shipped paddy for the Government and earned 12 annas (75c.) per bag.

The defendants give credit to the plaintiff for the money he advanced and the amount actually earned, and claimed the difference between those sums and what the defendants would have earned, if the first voyage named in the charter party had been made. In my opinion the demand is perfectly just.

[1] *(1878) 3 C. P. D. 443 and 48 L. J. C. 62.*
[2] *(1878) L. R. 7 Ex. 259 ; 41 L. J. Ex. 164.*

I would answer the issues thus—

(1) The advance of Rs. 800 was for the first voyage, and that of Rs. 900 for the second (see charter party).

(2) I should say Rangoon, the port from which the vessel had to proceed in Markali to be at Akyab to load.

(3) Yes, that is, the shipment to Jaffna, but he could, if he had used due diligence, shipped to South Indian ports.

(4) Yes.

(5) Yes, but at the time plaintiff applied for licenses, none was available. So far as I can gather from the evidence there was no prohibition of exportation of paddy by sailing vessels to South Indian ports. Certain quantities were allocated to certain ports, and a limited number of licenses issued. Presumably those who applied in time got licenses.

(6) Yes.

(7) The defendants, apparently, admit their liability to pay back the sum of Rs. 1,700, for they give credit to plaintiff for that amount. I might state here that the rule as to freight which is advanced is that it is irrecoverable, though the freight is not earned (Per Blackburn J. in *Allison v. Bristol Marine Insurance Company*).[1]

(8) The amount claimed is due.

(9) See answer to issue 5. The plaintiff did not apprise the defendants of the fact before the vessel left Rangoon. Possibly, if he did so, the contract might have been dissolved. It seems, however, that at the time the plaintiff claims to have given the information, the vessel was on its way from Rangoon to Akyab.

(10) No. The parties appear not to have suspected that licenses would be refused for South Indian ports not beyond Paumban.

(11) No.

Plaintiff's action is dismissed, with costs, and judgment for the defendants for the amount (Rs. 1,275) claimed in reconvention.

The charter party was as follows:—

Translation.

On this 7th day of November, 1919.

Corresponding to the 22nd day of April of the year Sitterti (Tamil date) to agreement of charter party entered into by V. Saravanamuttu Selvanayagam and V. Saravanamuttu Somasundram of Velvadditurai with P. A. R. L. Somasunderampillai Chetty of Jaffna is as follows:—

That we, the said Selvanayagam and Somasunderam, are the owners of the brig "Meera Mohideen Sammadhany Hydroos," which has the capacity of carrying a load of about 2,800 bags (of paddy) on her first trip and about 2,700 bags (of paddy) on her second trip.

That we, the said owners, agree that our above said brig will have two voyages bringing the cargo of paddy as mentioned above from Akyab, and the freight agreed upon between us and the above-named Somasundram Chetty is Re. 1¼ per bag. Having thus agreed, we, the owners of the vessel, have received from the said Chetty a sum of rupees one thousand seven hundred (Rs. 1,700) in advance.

[1] *(1876) 1 A. C. 209.*

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That it is further agreed by us, the said owners, that our vessel will sail for Akyab in the Tamil month of Marakali, and as soon as it reached the harbour of Akyab, we will inform of it to the said Chetty, and on receiving his order, we will receive the consignment of paddy or rice as weighed out tons at Akyab, and carry it over to one of the ports at Jaffna, discharge it, and give it in charge of the Custom authorities there. We further agree to deduct for the first trip from the total amount of freight due to us at the rate mentioned above a sum of rupees eight hundred (Rs. 800) being the part of advance intended for the first trip of the amount received by us in advance as mentioned above, and for the second trip to deduct from the total amount of freight due to us a sum of rupees nine hundred (Rs. 900) being the part of advance intended for the second trip and received by us as aforesaid. We further agree that we will also deduct from the amount freight due to us a sum of rupees five hundred (Rs. 500) for each of the trips, which amount to be paid to the master or tindal of the vessel at Akyab and taken account of in the Bill of Lading.

But, providentially, if the Government does not grant permit for the export of paddy from India to Jaffna, we both, the parties concerned in this charter party, agree that paddy should be exported by the said vessel to Paumban and other Indian ports which lie within Paumban, and we both, the contracting parties, will make reasonable arrangements regarding such exports.

We, the said owners of the said vessel, further agree and bond ourselves, we will bring two consignments, paddy for the said Chetty from Akyab, and discharge the cargo either at the Kankesanturai port or at the Kayts port. We further agree that for bringing the second consignment from Akyab, if our vessel does not sail in time, or if she sails later than the other vessels and be too late, we will return to the said Chety the amount of Rs. 900, and which received as advance for the second trip, thus agreeing we signed this document.

Pereira, K.C. (with him *S. Rajaratnam*), for the appellant.

Hayley (with him *J. Joseph*), for the respondent.

March 7, 1923. BERTRAM C.J.—

Mr. Hayley be his very able argument has elucidated a somewhat obscure case. He pressed upon us this proposition; that accepting the learned Judge's findings and inferences of fact, the story was this:—The ship came to Akyab, and at the time it got there, it became clear that the primary object of the contract, namely, the shipment of rice to Jaffna, could not be accomplished. Thereupon, he says, an obligation arose upon the plaintiff to proceed upon the alternative line provided for by the contract, namely, to see to the shipment of rice to Paumban or other Indian ports. He says that the plaintiff chose to wait in the hope of some favourable circumstance arising. He waited too long and then found that even the alternative course provided for by the contract became impossible. He says that the plaintiff himself took the responsibility for this, and is responsible to the defendant for the loss which consequently arose.

There is only one flaw in this argument. As it seems to me personally, though I admit that two constructions are possible, I feel a difficulty in agreeing that the terms of the clause discussed in argument are so explicit as to bring about an immediate obligation. As I understand, the parties agreed, that if shipment to Jaffna proved impossible, they would mutually make arrangements for shipment to Paumban or some other neighbouring port. I feel a difficulty, therefore, about giving the defendant damages in respect of the alleged breach.

On the other hand, it seems to me that on that supposition the plaintiff on his side is entitled to nothing. It is clear to me that the payment of Rs. 1,700 which he made was an advance in respect of freight ultimately to become due, and on the authorities cited by Mr. Hayley, in particular, the case of *Allison v. The Bristol Marine Insurance Company* (*supra*), I do not think that the advance is recoverable. I think that the justice of the case will be sufficiently met, if we determine that the plaintiff is not entitled to recover anything in respect of the advance, and that the defendant is not entitled to recover anything in respect of the alleged breach. In the circumstances each party should pay its own costs both here and below.

DE SAMPAYO J.—I agree.

Varied.