(1910) 07 CAL CK 0004

Calcutta High Court

Case No: None

The British and Foreign Marine Insurance Co.		APPELLANT
	Vs	
The India General Navigation and Railway Co. Ltd.		RESPONDENT

Date of Decision: July 12, 1910

Acts Referred:

- Carriers Act, 1865 - Section 9

Citation: 9 Ind. Cas. 364

Hon'ble Judges: Lawrence Jenkins, C.J; Woodroffe, J

Bench: Division Bench

Judgement

Lawrence Jenkins, C.J.
This appeal arises out of a suit brought against common carriers to recover Rs. 27,915 in respect of 1,000 bales of jute lost on the carriers'' flat, on the allegation that the loss or damage to the goods was caused by, or arose from, the negligence or criminal acts of the carriers or their servants or agents, the plaintiffs being the owners of the goods and an Insurance Company, who have paid these owners under a policy on the goods the amount now claimed.

2. The point in contest is whether, as the carriers contend, they are exempt from liability by the terms of a contract between the owners and the carriers and of the policy under which the goods were insured by the Insurance Company.

3. On the 25th February 1908, the Indian General Navigation and Railway Company Limited, (to whom I will hereafter refer as the Carrying Company) issued a bill of lading in respect of 1,000 bales of jute on their flat "Lemro" then at Madaripur. The jute was shipped by G.R. Chakraverty & Co., for delivery to Landale and Morgan or the carriers'' Calcutta agent at the Mill of the Ganges Manufacturing Company Limited, to whom I will hereafter refer as the Manufacturing Company. On the 5th of

March 1908, the British and Foreign Marine Insurance Company, to whom I will hereafter refer as the Insurance Company, in accordance with a previous letter of cover issued a policy of insurance for Rs. 27,915, in respect of the jute in favour of the Manufacturing Company to whom the bill of lading had been endorsed. The flat "Lemro" with the jute on board caught fire and had to be scuttled with the result that the jute was lost. On the 23rd of May 1908, the Insurance Company paid the Manufacturing Company Rs. 27,915 under the policy, and they claim by right of subrogation to recover this amount from the Carrying Company. It is to enforce their claim that this suit has been brought by the Insurance Company, and the Manufacturing Company. Harington J., has held in favour of the Carrying Company and dismissed this suit. Hence this appeal.

4. Before attempting to determine the rights of the parties as defined by the special contracts on which reliance is placed it will be well to see what are the relative rights and liabilities of common carriers and those for whom they carry apart from special contract. These rights and liabilities are outside the Indian Contract Act, and are governed by the principles of the English Common Law as modified by the Carriers Act of 1865. A common carrier, therefore, in India is subject to two distinct classes of liability; the one for losses for which he is liable as an insurer, the other for losses for which he is liable under his obligation to carry safely. Speaking generally the first of these are insurable risks from which the element of default is absent, the second are risks of conveyance in which that element is present. The Carriers Act of 1865 has in some degree modified this position. This Act follows the scheme but not the details or the language of the English Carriers Act, II Geo. IV and I Will; IV C. 68.

5. The earlier sections limit the liability of carriers in respect of the perishable or valuable goods specified in the schedule to the Act. Section 6 which is applicable in the circumstances of this case provides that the liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice." While Section 8, provides that "notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried, where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants." Section 9 is in these terms: "in any suit brought against a common carrier for the loss, damage or nondelivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or nondelivery was owing to the negligence or criminal act of the carrier, his servants or agents."

6. The effect of these sections is that the liability of a common carrier for the loss of goods not being of the description contained in the schedule may be limited by special contract signed by the owner save where such loss stall have arisen from the negligence or a criminal act of the carrier of any of his agents or servants.

7. This then being the nature of a common carrier''s liability it now becomes necessary to see how far it has been limited by special contract in this case.

8. The jute, as I have already said, was shipped by G.R. Chakraverty & Co., and on the 25th of February 1908, a bill of lading was issued in which G.R. Chakraverty & Co. were stated to have shipped the jute in the flat "Lemro" then at Madaripur, and it was further stated that the jute was received subject to the conditions endorsed thereon to be delivered for and on account of and at the risk of the shipper to Landale and Morgan or to the Carrying Co.''s agent at Calcutta Ganges Manufacturing Co.''s jute mill or as near there to as the state of the river might permit.

9. By the 5th condition it is provided that--"The Company will not be liable for the loss of or damage to any property delivered to them to be carried unless such loss or damage shall have arisen from the negligence or criminal act of their servants or agents."''

10. This bill of lading was endorsed to the order of the agents Ganges Mill by Landale and Morgan. What the relations were between the shippers and the Manufacturing Co. does not appear, nor are the parties before us agreed on the point.

11. If matters rested there the Carrying Co. would manifestly be liable on the terms of the contract as evidenced by the bill of lading for loss that had arisen from the negligence of their servants or agents. But there are other documents that have to be considered: first there is a contract of the 23rd of May 1906, between the Manufacturing Co., and certain steamer Companies of which the Carrying Co. were one; and next there is a policy of Insurance issued by the Insurance Co. to the Manufacturing Co.

12. By the contract of the 23rd of May 1906 the Manufacturing Company agreed in effect to have all their jute from certain named ports conveyed by one or other of the Steamer Companies for a term of five years and during that term not to send any jute from any of those ports save by the steamer, flats or other vessels of the Steamer Companies. They further bound themselves to forward all unshipped jute bought by them by steamers, flats or vessels belonging to the Steamer Companies or by the alternative route then indicated. By Clause 10 it is provided that "the Jute Company undertakes and agrees to hold the Steamer Companies harmless and indemnified from and against all claims which can be insured against or covered by an ordinary F.P.A. policy, that is to say, against claims for actual or constructive total loss only of the goods insured and not against claims for partial loss or damage unless the vessel be stranded, sunk or burnt, and the Steamer Companies agree that they shall have no right to claim on the cargo for general average."

13. This clause, the Carrying Co. maintain, is one of the matters entitling them to exemption. First then it has to be seen whether it has any application in the

circumstances of this case, and then whether on its true construction it has the force for which the Carrying Co. contend.

14. Now it is to be noticed that the agreement of the 23rd of May 1906 relates to jute sent or transmitted by the Manufacturing Co., or unshipped jute bought by them, and Clause 10 can only relate to jute falling within that category. But I have already shown that under the Bill of Lading this jute is expressed to have been shipped by G.B. Chakraverty & Co., and there is nothing to show that the relations between him and the Company were such as to demand the inference that he was acting for the Manufacturing Co., or that the jute was bought by that Company unshipped. Moreover, this jute was despatched from Madaripur, and not from one of the ports specified in the agreement, and there is not a word on the record of this case, to show that this agreement was extended to jute from Madaripur. It is true that the learned Judge says otherwise; but he must have had in mind what was proved in another case. Further than this the jute was shipped at a rate other than that stipulated in this agreement. There is thus an initial difficulty in the way of applying the terms of agreement to this jute But I will pass that by and consider what is the legal effect of these two documents. Clause 5 of the Bill of Lading contemplates that the Carrying Co. shall be liable for loss arising from the negligence or criminal acts of servants or agents. Clause 10 of the agreement according to the reading proposed by the Carrying Co. is designed to protect them against loss so originating. There is, therefore, here a conflict, but the Carrying Co, would compose it by applying the terms of Section 17. of the Bill of Lading. That, however, only applies when the conditions of the Bills of Lading conflict with the terms of any other agreement between the shippers and the Carrying Co.; it is G.R. Chakraverty & Co., who are the shippers; and the agreement of the 23rd of May 1906 is not with them. Therefore, as it seems to me if matters rested there the bill of lading must prevail. But in the view I take of Clause 10 of the agreement there is no conflict.

15. I have already indicated that the risks of a common carrier are twofold, insurance risks and carrying risks. It has been the policy of the English Courts in dealing with exemption clauses to recognise this distinction and to construe them as not extending to carrying risks in the absence of clear words to that effect. In India, where there is a statutory prohibition against exempting a carrier from loss arising from negligence or criminal acts, there is perhaps an even stronger reason for adopting this canon of construction, at any rate within the limits implied by this prohibition. I need not refer to the English cases on this point; they are collected in Price v. Union Lighterage Go. (1903) 1 K.B. 750; and on appeal (1904) L.R. 1 K.G. 412 : 73 L.J.K.B. 222 : 89 L.T. 781 : 52 W.R. 325 : 9 C.C. 120 : 20 T.L.R. 177 : 3 S.E. C (N.S) 1 and James Nelson and Sons Ld. T. Nelson Line (Liverpool), Ld. (1917) L.R. 1 K.B. 769 : 96 L.T. 402 : 10 Asp. M.C. 330 : 12 Com. Case 210 : 23 T.L.R. 302. Mr. Mitter sought to escape from this by suggesting that this doctrine was limited to bills of lading, but numerous cases show that this is not so and by way of illustration I may refer to

Wyld v. Pickford 8 M. &. W. 443; D''Are v. L. & N.W. Railway Co. (1874) L.R. 9 C.P. 325 : 30 L.T. 763 : 22 W.R. 919 and Martin v. G.I.P. Railway Co. (1863) L.R. 3 Ex. 9 : 37 L.J. Ex. 27 : 17 L.T. 349. But then he contended that at any rate it could not be applied to Clause 10 of this agreement, for this, he maintained, was an independent contract of indemnity which, therefore, should be construed strictly against the Manufacturing Company, as the insurers. His argument was this I am not seeking to escape from my liability for negligence under the Bill of Lading but merely to protect myself under the indemnity given me by the Manufacturing Company," and this indemnity, he argued, was absolute and so would operate to protect the Carrying Company not only against liability to the Manufacturing Company but also against liability to any endorsee of the bill of lading, and this though the liability might arise from a loss occasioned by a criminal act of the Carrying Company, its agents or servants. There is nothing on the record to show that the Manufacturing Company had power to make any such: contract, but apart from that I think this contention must fail. It is true that the agreement of the 23rd of May 1906 is not a bill of lading, but it is a contract between common carriers and intending shippers and Clause 10 is not an independent contract of indemnity but an integral part of this contract as to carriage and must be so construed. Indeed if it were an independent contract in the sense for which Mr. Mitter contends then this would seem in itself to furnish an answer to the Carrying Company''s contention that it is not liable in this suit, but this I need not elaborate. The rule of construction which limits the operation of a clause of exemption is based on no technicality but on sound policy and so it is pointed out by Willes, J., in Czech v. G.S.N. Company (1867) L.R. 3 C.P. 14 : 37 L.J.C.P. 3 : 17 L.T. 246 : 16 W.R. 130 that it is consistent with the views of the modern jurists and will be found in many of the Maritime Codes of Europe. The decision in Baxters Leather Company v. Royal Mail Steam Packet Company (1908) L.R. 2 K.B. 626 : 77 L.J.K.B. 988 : 99 L.T. 286 : 24 T.L.R. 537, was cited to us as though it modified this view. The Court there held that the exemption in that case extended to losses occasioned by the shipowners'' negligence notwithstanding this rule of construction as the words and provisions of the Bill of Lading left no room for doubt. This case in fact expressly recognises the rule and in no way detracts from its force. Nor does this case help the Carrying Company so far as it may be cited as a guide for the construction of Clause 10. What influenced the Court there was the fact that there were alternative rates and that the shipper did not avail himself of that rate which would impose on the shipowner a larger liability; and the view that the clause in question would have no operation unless it applied to cases of negligence; But neither of those factors Are present here a rate was paid which imposed upon the Carrying Company liability for loss arising from negligence or criminal acts (see Clause 5 of the Bill of Lading) and there are several grounds of liability to which Clause 10 of the agreement would apply though the exemption be not extended so as to cover and protect negligence. In my opinion, therefore, on a true construction of Clause 10 of the agreement it does not extend to loss arising from negligence or criminal acts in spite of the wide terms in which it is expressed. The position then-would seem to be

that described in Crouch v. L.N.W. Railway (1854) 23 L.J.C.P. 75 : 14 C.B. 255 : 7 R.C. 717 : 2 C.L.R. 188 : 18 Jur. 148 : 2 W.R. 166, where Maule J., said "A common carrier who makes no stipulation is liable as an insurer Kit a common carrier who by notice limits his liability and says I will not contract as an insurer or I will only contract of such and such an extent or to the extent of such a value" still remains in all other respects a common carrier because although the incident of not being an insurer does not apply to him that is simply because it is not provided for.

16. Therefore, Clause 10 would be no answer to a suit brought by the Manufacturing Company for a loss arising from the negligence or criminal acts of the Carrying Company, its agents or servants and it is solely with loss so originating that I am concerned. I say that it is with loss so arising that I am concerned as in the absence of evidence to the contrary Section 9 of the Carriers Act of 1865 would apply.

17. Does it then make any difference that the Insurance Company is the real claimant.

18. The suit is brought by the Insurance Company and the Manufacturing Company. This is wrong. The Insurance Company claim by way of subrogation and not of assignment so that they had no right to sue in their own name and the suit could only be brought in the name of the Manufacturing Company. I need hardly say that the plea raised in paragraph 12 of the written statement is wholly misconceived and is in fact a complete reversal of the true position. What then is the position of an insurer who relies or the principle of subrogation. It is thus described by Lord Blackburn in Burnand v. Rodocanachi (1882) L.R. 7 A.C. 333 : 51 L.J.Q.B. 548 : 47 L.T. 277 : 31 W.R. 65 : 4 Asp. M.C. 576: "The general law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land Or any other contract of indemnity) and a loss happens anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay: and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

19. If then the Manufacturing Company had recovered damages from the Carrying Company, before payment by the Insurance Company, that, apart possibly from some special contract, would have diminished the money payable under the policy, and the Insurance Company would equally be entitled to the benefit of any amount recovered after payment by them of the policy money. Now this, when the errors of the plaint are eliminated, is a suit by the Manufacturing Company to recover damages from the Carrying Company, and any matter that could be pleaded against the Manufacturing Company would be an effective answer though in truth the purpose of the suit was to benefit the Insurance Company Simson v. Thomson (1877) 3 A.C. 279 : 38 L.T. 1 : 3 Asp. M.C 567. But then it is contended that in the special circumstances of this case the Insurance Company is even at a greater

disadvantage because it is urged that both Clause 10 of the agreement and also the terms of the policy stand in their way. I have already held that Clause 10 does not extend to loss caused by negligence or criminal acts. It, therefore, affords no answer, so I need not consider whether in the absence of the memorandum and articles of association it would be reasonably assumed that, the Manufacturing-Company had power to enter into such a far reaching contract of indemnity or whether the clause comes within the mischief of Section 23 of the Contract Act.

20. It thus only remains for me to deal with the contentions based on the contents of the policy of insurance.

21. Now this policy was issued by the Insurance Company in favour of the Manufacturing Company and it contains the following stipulation: warranted no recourse against carriers."

22. The Carrying Company attach considerable importance to these words and maintain that they amount to an absolute relinquishment by the Insurance Company of all rights by way of subrogation against them. But, in my opinion, this contention cannot be supported. These words were necessary to protect the Manufacturing Co. against the possibility of an objection by the Insurance Co. that there had been a concealment of the exemption in favour of the Carrying Co. to the extent I have already indicated: but I can see no reason for reading them as equivalent to a relinquishment by the Insurance Co. in respect of risks not so exempted. In that view there would not be a relinquishment of claims where the loss has arisen from negligence of the Carrying Co. its agents or servants. It, therefore, becomes unnecessary for me to discuss whether, if the words bore the meaning for which the Carrying Co. argue, is would be open to that Company to rely on them seeing that they are not parties to the contract in which the words are contained or the arguments in, this connection urge on behalf of the Carrying Co. on the strength of what was said by Mathew. J., in Thomas. & Co. v. Brown 4 C.C. 188.

23. I have now dealt with all the points urged before us for though it was unsuccessfully contended before Harington, J., that the Carrying Co, had not received the notice prescribed by Section 10 of the Carriers Act, the contention was expressly abandoned before us by counsel for the defence. The result then is that we cannot uphold the judgment of Harrington, J., and must reverse the decree with cost here and in the Court of first instance. There is, however, a difficulty as to the damages to be awarded, in that there has been no proper proof on the point. It seems probable that both sides accepted the amount paid under the policy as correctly representing the damages, but if they cannot agree as to this then there must be an enquiry; for though the plaintiffs ought to have proved the amount of damages at the hearing. It would not in the circumstances be right to visit their default in this regard with the penalty of a dismissal of the suit.

Woodroffe. J.

24. I agree.