

(2005) 08 CAL CK 0060

Calcutta High Court

Case No: F.A. No. 83 of 1989

Bangladesh Shipping
Corporation

APPELLANT

Vs

Bata India Ltd. and Another

RESPONDENT

Date of Decision: Aug. 25, 2005

Acts Referred:

- Carriage of Goods by Sea Rules - Rule 6
- Limitation Act, 1963 - Section 3

Citation: AIR 2006 Cal 32 : (2006) 3 CHN 276

Hon'ble Judges: Sadhan Kumar Gupta, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Supriya Basu and Amalendu Mitra, for the Appellant;

Final Decision: Allowed

Judgement

Bhaskar Bhattacharya, J.

This first appeal is at the instance of a defendant in a suit for recovery of money and is directed against the Judgment and Decree, dated July 22, 1988 passed by the Assistant District Judge, 8th Court, Alipore in Money Suit No. 54 of 1982 thereby passing a decree for recovery of Rs. 1,09,315/- against the appellant herein.

2. The respondent filed the aforesaid suit, in the 8th Court of Assistant District Judge, Alipore, against the appellant, and the case made out by the respondents may be summed up thus :

(a) On or about 24th April, 1981, on the vessel "S.S. SOLIDARITY" owned by the defendant, at the port of Moji, Japan, 200 bags of special grade synthetic rubber known as "NIPOL HS-860 B.T.N." in good condition were boarded by Messers Ferimek Ltd. Tokyo, Japan and the defendant in consideration of the freight paid, agreed with the said shipper to carry to the port of Calcutta and deliver those goods in accordance with the terms and conditions of the contract of shipment evidenced

by the bill of lading dated 25th April, 1981 issued by or on behalf of the defendant.

(b) The plaintiff No. 1 was the owner of the said cargo and also the endorsee for value of the said bill of lading. The said vessel arrived at Port of Calcutta on 7th May, 1981 and unloaded the said cargo on or about the selfsame day with short-delivery and in damaged condition."

(c) Out of 2000 bags of the said cargo, only 1641 bags were landed and the remaining bags being 359 bags could not be found and/or landed.

(d) On a survey held on 13th June, 1981 by the surveyor appointed by the plaintiffs, the said cargo was found to be damaged and short in quantity and the aforesaid short landing of cargo was caused by the negligence and failure on the part of the defendant or its agents or servants to exercise proper care in handling and carrying and storing during transit in breach of their obligations under the said bill of the said cargo.

(e) The plaintiff No. 1 suffered loss and damages amounting to Rs. 1,17,441,64p., as a result of short landing and damage of the cargo. By a letter dated 25th July, 1981 the plaintiff No. 1 lodged its claim against the defendant with its agents but the claim was ignored. The said cargo was, however, covered under an "ALL RISKS" marine insurance policy issued by plaintiff No. 2 in consideration of premium paid by the plaintiff No. 1.

(f) The plaintiff No. 1 submitted its claim to Plaintiff No. 2 for loss of the insured goods and the plaintiff No. 2 paid a sum of Rs. 1,17,441.64p to plaintiff No. 1 in full and final settlement of the said demand.

(g) On payment of the aforesaid amount by plaintiff No. 2, the plaintiff No. 1 assigned the said policy to the plaintiff No. 2 who became subrogated to all the rights and remedies of the plaintiff No. 1 against the defendant in respect of the loss due to short delivery of the said cargo,

(h) The plaintiffs claimed a sum of Rs. 1,09,315.50p being the actual loss sustained due to short landing of 359 bags of the said cargo at the rate of Rs. 304.50p. per bag and the balance sum of Rs. 8,126.14p was waived.

3. Defendant contested the aforesaid suit by filing written statement thereby denying the material allegations made in the plaint. The defendant, apart from taking the plea that the suit was not maintainable and was barred by limitation, denied all the allegations made in the plaint.

4. At the time of hearing of the suit, one Mohhamad Jalauddin Khan, an employee of plaintiff No. 2 was examined in support of the plaintiffs' claim and was cross-examined by the learned advocate of the defendant but no evidence, either oral or documentary, was adduced on behalf of the defendant.

5. By the Judgment and Decree impugned herein the learned trial Judge has decreed the suit in full after overruling all the objections taken by the defendant.

6. Being dissatisfied, the defendant has come up with the present appeal.

7. Mr. Bose, the learned advocate appearing on behalf of the appellant, before entering into the merit of the claim, has strenuously contended before us that the learned trial Judge ought to have held that the suit was barred by limitation. Mr. Bose points out that in the plaint it is admitted that the vessel arrived at the Calcutta Port on 7th May, 1981 and on that day delivered the damaged and the lesser quantity of goods but the suit was filed admittedly on 12th May, 1982. By referring to the averments contained in paragraph 13 of the plaint, Mr. Bose submits that in the said paragraph the plaintiff pleaded that the cause of action arose on 13th May, 1981 when the said vessels left the port of Calcutta without discharging or delivering 359 bags of the cargo. Mr. Bose submits that according to the provisions contained in the Rule 6 of Article III of the Indian Carriage of Goods of Sea Act, this type of suit should be filed within one year from the date of discharge of the goods or within one year from the date when the vessels left the port where the goods were agreed to be delivered. Mr. Bose submits that the sole witness for the plaintiffs in his evidence admitted that he was not aware of the date on which the vessel left Calcutta. Such being the position, Mr. Bose contends, the suit filed on 12th May, 1982 was patently barred by limitation. Mr. Bose further tried to impress upon this Court that plaintiff No. 2, the Insurance Company having paid Rs. 1,17,441.64p to the plaintiff No. 1, it is not credible that the plaintiff No. 2 would lodge a lesser amount of claim by waiving a sum of Rs. 8,126.14p. By pointing out the aforesaid fact, Mr. Bose submits that the plaintiffs really failed to prove that there was any short landing of the goods or that the goods were received in damaged condition. He, thus, prays for setting aside the Judgment and Decree passed by the learned trial Judge.

8. None appears on behalf of the respondents to oppose the present appeal,

9. After hearing the learned Counsel for the parties and after going through the oral and documentary evidence adduced by the parties we are convinced that in this case, the plaintiffs have definitely proved short landing of 359 bags and the loss suffered by the plaintiffs on that account. All the documentary evidence adduced by the plaintiffs support their claim. No person came forward on behalf of the defendant-appellant to controvert the authenticity of those documents and as such, there is hardly any scope of disbelieving those documents. We are, therefore, satisfied that, the plaintiffs proved short landing of the goods and the damages suffered by them on that account. No adverse inference can be drawn against the plaintiff for their decision to waive a part of the claim as suggested by Mr. Bose.

10. As regards the question of limitation, we are, however, at one with Mr. Bose that the present suit must be held to be barred by limitation. According to Article III, Rule

6 of the Indian Carriage of Goods by Sea Act, 1925, the carrier and the ship should be discharged from all liability in respect of loss and damage unless the suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. In this case, admittedly the goods were delivered on 7th May 1981. According to the said provision, suit must be filed within one year from the time when the goods were delivered or when the goods should have been delivered, meaning, one year from the date the vessel left the port. The plaintiff specifically averred in the plaint that the vessel left the Calcutta Port on 13th May, 1981 and accordingly, suit was filed on 12th May, 1982. We have already pointed out that the sole witness for the plaintiff in cross-examination admitted that he was not in a position to disclose the date on which the vessel left Calcutta Port. The said witness for the plaintiffs could not produce any documentary evidence showing the actual date of departure of the vessel from Calcutta. If the plaintiff is unable to prove the date of leaving the port of Calcutta, in such a case, limitation should start from the other date available, namely, the date of delivery of goods namely, 7th May, 1981, and in that event, the suit ought to have been filed by 6th May, 1982.

11. We, thus, find that the plaintiffs have failed to prove that the suit is filed within the period of limitation; on the other hand, from the documents produced by plaintiff, it appears that the suit is barred by limitation.

12. We are quite conscious that in this case no evidence has been adduced on behalf of the defendant disputing the claim of the plaintiff and even in the written statement vague denials were given; nevertheless, the plaintiffs could not prove the date of cause of action as pleaded in the plaint, namely, 13th May, 1981; on the other hand, the documents exhibited by the plaintiffs proved that the cause of action had arisen on 7th May, 1981, the date of delivery of goods. Therefore, the learned trial Judge erred in law in passing decree in a suit that is barred by limitation. It is now settled law as provided in Section 3 of the Limitation Act that even if no defence is taken that the suit is barred by limitation, a duty is cast upon the Court to see whether on the basis of materials on record the suit is found to have been filed within the period of limitation.

13. We, thus, find that the learned trial Judge erred in law in passing decree in a suit, which on the basis of evidence adduced by the plaintiffs, is barred by limitation and on that ground alone, we set aside the judgment and decree passed by the learned Trial Judge. The appeal is, thus, allowed. In the facts and circumstances, there will be, however, no order as to costs.

14. I agree.