(1869) 02 CAL CK 0021

Calcutta High Court

Case No: None

Turner, Morrison and Others	APPELLANT
Vs	
Ralli and Mavrojani	RESPONDENT

Date of Decision: Feb. 16, 1869

Judgement

Sir Barnes Peacock, Kt., C.J.
The facts of this case are not very accurately found. There is no express finding as to what the contract really was. In the case, as originally stated, it was stated that the copy of the shipping order (Exhibit A) was put in and proved. In another part of the case, the learned Judge says:--

On the question of law, I was of opinion that there was no breach of the contract on the part of the plaintiffs, because seaworthiness is not a condition "precedent of the contract contained in Exhibit A.

The Judge there treats Exhibit A not as the shipping order, but as the contract; and afterwards, with reference to the first question which he has put he says:-- "Should the opinion of the Hon''ble Judges be that there does arise an "implied condition precedent of seaworthiness out of the contract contained in "Exhibit A, my judgment will be for the defendants."

2. It is clear, however, that Exhibit A was a mere shipping order, a direction from the ship''s agents, Turner, Morrison and Co., to the Commanding Officer of the ship, requesting him to receive on board certain goods at a certain rate of freight. It was not signed by the defendants, nor did it express any obligation on their part to do any thing; it was clearly, therefore, not a contract. In the subsequent statement made by the learned Judge, and which must be taken as part of the case, his meaning is, we think, sufficiently explained. He there says:-- "The shipping order was put in by the plaintiffs, and accepted by defendants as representing the contract itself." We, therefore, understand the learned Judge to mean that the shipping order represented the terms of the contract which had been entered into between the parties; and in the order we find that the ship was loading for London; that certain

goods were to be put on board, to be carried at a certain rate of freight; and that there was no express representation or warranty as to the state of the ship. The question then is, whether there was an implied condition of seaworthiness, the breach of which justified the defendants in refusing to put their goods on board according to the terms of the contract.

3. The Judge finds merely that the ship was unseaworthy at the time of sailing. But it is clear that the unseaworthiness of the ship, at the time of sailing, did not amount to a breach of a condition precedent, which justified the defendants in refusing to put their goods on board; for it is evident that the goods ought to have been put on board, if at all, before the ship sailed. The learned Judge has not stated whether the unseaworthiness existed at the time when the defendants ought to have put their goods on board according to their contract. "We are disposed to think that the Judge really intended to find that the ship was unseaworthy at the time that the goods ought to have been put on board, and that he has fallen into a mistake as to the time at which he intended to find unseaworthiness, in consequence of his not adverting to the fact that this suit was brought for a breach of contract in failing to ship, and not on a policy of insurance, with regard to which the time of sailing is the time at which the risk commences, and is consequently the time at which it is material to consider whether the ship was seaworthy or not.

4. The learned Judge, in his amended statement, says, that he cannot profess to retain any very distinct recollection of the facts of this particular case; and it is, therefore, unnecessary for us to return the case to him for further amendment. We must express our opinion upon the facts as found by the Judge, and we think it will also be right at the same time to state our opinion with reference to the facts as the Judge probably would have found them, if his attention had been directed to the nature of this action.

5. We entirely agree with what has been stated by Sir Lawrence Peel in the case of Potter & Co. v. Jardine, Skinner & Co. (Gas. Sm. C.C. Ref., 33), in which he says, that, "when a case is sent up by the Small Cause Court for our opinion, the "facts which are stated must form the basis of our judgment. The reasoning or "conclusions of the Judge most be distinguished from the facts which be finds "and presents to us for our opinion, whether the law has been rightly applied "by that Court to a certain state of facts, we are not to determine whether the "Court should have found that state of facts or not. Indeed, in general, the "evidence is not properly before us." Dealing with the facts as stated, we have no hesitation in saying that the unseaworthiness of the ship, at the time of sailing, was not a breach of the terms of the agreement, which justified the defendants in refusing to ship their goods.

6. With reference to the question, whether the unseaworthiness of the ship at the time at which the goods ought, according to the terms of the contract, to have been put on board, there is another difficulty which arises on the finding of the Judge that the ship was "unseaworthy." The term "seaworthy" has been declared to mean in

the case of an insurance for a certain voyage, that the ship is in a fit state as to repairs, equipment, and crew; and in all other respects to encounter the ordinary perils of the voyage insured, at the time of sailing upon it, Dixon v. Sadler (5 M. & W., 414).

7. If the unseaworthiness which is found by the Judge means such a state of the ship that she could not be put into a proper state to encounter the voyage, it would be very different from unseaworthiness as regards the equipment, the crew, and many other matters. For example, a merchant has frequently to begin to ship his goods a month before the ship is intended to sail. No one would contend in such a case that the merchant would not be bound to put his goods on board, because there was not at that time on board a sufficient crew for the voyage. A full crew is frequently not obtained until the day before that on which the ship is to sail. We cannot, therefore, say that the condition precedent to the shipment of the goods was that the ship should be seaworthy within the meaning of the definition to which we have referred.

8. If the learned Judge meant that the ship was rotten, that her timbers were in such a state that she could not be put into a condition fit for the voyage while the goods were on board, and without such loss of time that the object of the merchant in putting his goods on board would be frustrated, it would, in our opinion, form an answer to the action. We think that it is a condition precedent that the ship shall be in a proper state to receive the goods on board for the purpose of being carried on the voyage. By this, however, we do not mean that the ship must be in a proper state to start immediately on the voyage, but that she must be in such a state that she may be made fit, before the time at which she is to sail, to encounter the perils of the voyage. For instance, if a ship should have no dead lights, she could not be said to be unseaworthy on that account, for they might all be made good in a day. Such a circumstance would not justify a merchant in refusing to put his goods on board. We think the rule is laid down with tolerable accuracy in Maclachlan on shipping, page 353. The learned author, however, does not there say that there must be on board a sufficient number of officers and crew to manage the ship on the voyage, but only that there must be a sufficient number to guard the goods.

9. In the case of Lyan v. Mells (5 East. 428), which has been referred to, Lord Ellenborough said:--"In every contract for the carriage of goods between a "person holding himself forth as the owner of a lighter or vessel ready to carry "goods for hire, and the person putting goods on board, or employing his vessel or "lighter for that purpose, it is a term of the contract on the part of the carrier or "lighter-man, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public." We think that this warranty is one which not only entitles the merchant to recover damages for any loss or injury to his goods in consequence of a breach of it, but that it also forms a condition precedent to the merchants being bound to put his goods on board. We agree with what Mr.

Kennedy said in his argument that a merchant is not bound to put his goods upon an unsafe ship, and rely on his remedy by the recovery of damages, in the event of his goods being lost. In the case of a foreign ship, he might have to seek his remedy in a foreign country; and in many cases, his remedy might be utterly worthless.

10. We know of no distinction in this respect in point of law between a ship which carries goods and a ship which carries passengers. No one, we think, would hold that a passenger is bound to go on board a ship which is rotten and in an unfit and unsafe state, with the prospect of being drowned, or of being able to recover against the Captain, in the event of his suffering any injury. A ship-owner is like a carrier; he is bound to provide a safe and proper mode of conveyance. A man is not bound, because he has engaged to travel by a stage coach, or a dak ghari, or a railway, to get into a dilapidated and unsafe conveyance, and to risk his life or limbs.

11. In Lane v. Nixon (1 L.R., C.P., 421), there is a dictum of Mr. Justice Byles, which bears on this case; and though merely a dictum, we think it may fairly be referred to. He says:-- "I incline to agree with what Mr. Williams says "as to the implied warranty of seaworthiness. If the policy is effected by the "ship-owner, it is a condition precedent, which he can and ought to perform. "Even, where the insurance is upon cargo, the owner has his remedy against "the ship-owner, or he may refuse to put his goods on board if the vessel be not "seaworthy." Using the word "seaworthy," we take it in the sense in which we have used it.

12. The cases which have been referred to by Mr. Woodroffe, are clearly distinguishable from the present.

13. In the case of Schloss v. Heriot (32 L.J., C.P., 211), the marginal note is as follows:-- "In the contract of a ship-owner to carry goods " shipped on board his vessel, there is no implied condition that the "vessel shall be seaworthy. But in an action by the ship-owner against the merchant who shipped goods on board, for the latter''s share of an average "loss, it is a good plea on the ground of avoiding circuitry of action, to plead that "the ship was not seaworthy at the commencement of the voyage, and that the said average loss was caused and arose from and in consequence of such "unseaworthiness." We do not think that the marginal note is borne out by the case itself. The suit was brought to recover the defendant''s contribution to an average loss, and the declaration charged that the defendants promised that they would contribute and pay their just share and proportion, in relation to the goods, of any average loss that might arise or happen to the ship or her tackle, apparel, or furniture, during the voyage. It was held that seaworthiness of the ship was not a condition precedent to the performance of the contract. If it had been, the defendants would have been excused from paying their contribution, even if the loss had not been sustained in consequence of the unseaworthiness.

14. A ship would be unseaworthy if she had not a sufficient number of anchors, but it would be no answer to a claim for contribution for an average loss occasioned by

a gale of wind on the high seas, where no anchor could be used, to say that there were no anchors on board. It was, therefore, properly held in the case last cited that seaworthiness was not a condition precedent; but that, if it could be proved that the unseaworthiness of the ship caused the loss, in respect of which the contribution was claimed, that unseaworthiness would be an answer, to the action.

15. The case of Tarrabochia v. Hickie (1 H. & N., 183) was also cited. That was a suit in which the plaintiff declared that the plaintiff and defendants agreed by charter-party that the plaintiff''s ship, then lying at Fiume, being tight, staunch, and strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Cardiff, and there load from the factors of the defendants a full and complete cargo, in the customary manner to be loaded in twenty days, from the day on which the vessel was ready to load; and being so loaded, should therewith proceed to Malta, Corfu, Smyrna, Athens, Alexandria, Constantinople, or Gallipoli, as ordered, or as near thereunto as she might safely get, and there deliver the same, &c. The defendants bound themselves to ship a full cargo. At the trial it appeared that the charter-party was entered into on the 22nd April 1854.

16. On the 29th of the same month, the vessel, not then being ready to sail, an accident occurred while tightening the rigging, which rendered it necessary to have a new topmast, and the sailing of the vessel was in consequence delayed. On the 15th of May, the vessel being then about to sail, fouled her cable, whereby she was delayed until the 19th. On that day she sailed from Fiume; and on the 20th was compelled, by stress of weather, to enter the harbour of Sossius. She remained there until the 26th, when she proceeded on her voyage; and on the 16th of August arrived at Cardiff. The defendants then refused to load. The learned Judge left it to the Jury to say, whether the vessel was tight, staunch, and strong, when she sailed from Fiume; and if not, whether the object of the voyage was thereby frustrated. Also whether the vessel sailed and proceeded to Cardiff with convenient speed, or in a reasonable time; and if not, whether the object of the voyage was thereby frustrated. The Jury found that the vessel was not tight, staunch, or strong when she sailed from Fiume, but that'' she was so when she arrived at Cardiff. The Court held that the fact that she was not fitted for her voyage at the time of sailing, was not a condition precedent. She was fitted for the voyage at the time she arrived at Cardiff, but she was not at Cardiff in a state fitted for the voyage within a reasonable time, as agreed on in the charter-party. It was found that the delay had not frustrated the object of the merchant in shipping his goods, and that the breach of the contract did not amount to the breach of a condition precedent, so as to justify the merchant in refusing to put hi goods on board. It has been held in many cases that fixed time in a charter-party is of the essence of the contract. In the case last cited, it was merely held that not being at Cardiff in a reasonable time, was not a breach of the condition contained in the charter-party.

17. The case of Freeman v. Taylor (8 Bing., 124), which was referred to in that case, was cited by Mr. Kennedy. There, it was held that the deviation of a ship from the course agreed on in the charter-party, was so great as to put an end to the charter-party.

18. The case of Clipsham v. Vertue (5 Q.B., 265), which was cited by Mr. Woodroffe, was decided on a principle very similar to that on which the case of Tarrabochia v. Hickic was decided.

19. We think we may say that, if the vessel was not in a proper state to take the goods on board, for the purpose of being carried, on the particular voyage, and if she could not have been made fit for the voyage with the goods on board without such a delay as would frustrate the object of the merchant in shipping his goods, the merchant was not bound to ship the goods; but that the mere fact of unseaworthiness, in the ordinary acceptation of the term, at the time of sailing, was not a breach of the condition precedent.

20. The other question is stated by the Judge of the Small Cause Court as follows:-- "Whether, if there was such a condition precedent as above mentioned, "the defendants have deprived themselves of the right of claiming the benefit of "it, by having at first accepted and partially acted on the contract, which I find, "as a fact, that they did."

21. It appears to us that unless the defendants waived the performance of the condition by putting their goods on board, that fact would not deprive them of their right to set up the defence of unseaworthiness. It is not found that the defendants had any knowledge of the unseaworthiness when they partially put their goods on board. In the case of the forfeiture of a lease, the receipt of rent, after the forfeiture, is no waiver, unless, at the time of the receipt, the lessor has notice of the forfeiture. The same principle appears to us to apply to this case.

22. Mr. Woodroffe contended that it was not shown that the plaintiffs were aware that their ship was not seaworthy, but that appears to us to be immaterial. It is not a question of fraudulent misrepresentation of the state of the ship, but a case of warranty. If a man warrants a horse to be sound, it is no answer to say that he did not know it was unsound; but it would be an answer to a suit for a fraudulent representation of soundness, to show that the person making the representation of soundness, was ignorant of the fact of unsoundness, and the same rule applies to a charter-party. In Abbott on Shipping, 304, it is laid down that, "in a charter-party, the person who lets the ship covenants that it is tight, staunch, and sufficient; "and, "if it is not so, the terms of the covenant are not complied with, and the ignorance of the covenanter can never excuse him;" and in a note it is said that "the law of the United States is the same, "so also is the Scotch Law. Such ordinary hazards as occur, not by stress of "weather, or any extrinsic accident, but only from the ship and her furniture, be not upon the merchant, nor are relevant to free the shipper, who must

"have the ship sufficient at his peril." The case must go back to the Judge of the Small Cause Court, who will deal with it with reference to the above remarks, if the parties consent to its being decided on the present state of the record; or if the parties do not consent, there must be a new trial of the case, the Judge keeping the remarks of this Court before him.