
(1874) 03 CAL CK 0012

Calcutta High Court

Case No: None

Madhub Chunder Dey

APPELLANT

Vs

Law

RESPONDENT

Date of Decision: March 12, 1874

Judgement

Macpherson, J.

In this case there is no doubt that these four casks were shipped in London to be delivered in Calcutta, and that, as a matter of fact, they were not delivered in Calcutta, on the arrival of the Scindia, as they ought to have been. They were, by mistake, landed at Colombo, and did not eventually arrive here till about the 21st of July,--more than a month after the Scindia had discharged her cargo. The defendant says that there was no negligence on the part of the ship; and he relies upon two of the "conditions and exceptions" which form part of the bill of lading which he signed. One of these is as follows:--"The ship shall not be liable for incorrect delivery, unless each package shall have been distinctly marked by the shippers before shipment with the name of the port of destination." The bill of lading states that these four casks were shipped "being marked and numbered as per margin." The mark in the margin is C within a triangle, and the letters M and D on either Side, with the word "Calcutta" below. The defendant alleges that these casks did not bear the mark "Calcutta," as stated in the bill of lading, and that therefore, as they did not bear the name of the port of destination, the ship is not liable. For the plaintiff it is contended that, as the bill of lading states that these goods did bear the mark "Calcutta," the defendant cannot, as against the plaintiff, an endorsee for value, now say that they did not bear that mark. On the authority of the case of Howard v. Tucker 1 B. & Ad., 721, I think that the defendant is estopped from now saying that the casks were not marked in the manner stated in the bill of lading, and that, consequently, this "exception" is no protection to him.

2. But the defendant also relies on another of the "conditions and exceptions" in the bill of lading, viz.,--"the ship is not liable for * * * inaccuracies, obliteration or absence of marks, numbers, address or description of goods shipped." It is said, and truly, that even if the

defendant is not entitled to say that the goods were not properly marked when shipped, he may prove, if he can, that when they got to Colombo they did not bear the word "Calcutta," and that the word was "absent" or "obliterated," within the meaning of this exception. No doubt the defendant may prove that fact; and I think that he has proved it. "Whatever the condition of the casks may have been when they were shipped, when they reached Colombo no one of them was marked "Calcutta." They all reached Colombo in good order, except one, the head of which had been knocked out. The defendant has proved that the three uninjured casks did not bear the word "Calcutta," and that the end which was knocked out of the injured cask was the end corresponding with the end which was marked in each of the other three. Although, however, when the ship reached Colombo, there was an absence or obliteration of the word "Calcutta," it does not necessarily follow that the defendant is thereby relieved from responsibility.

3. The words of the "exception" are peculiar, and somewhat defective, if intended to meet such cases as this. For whereas it is stated in the bill of lading that the ship is not liable for incorrect delivery if the name of the port of destination is not distinctly painted on the goods before shipment, the language in the "exception" as to obliteration or absence of marks is quite different, it being merely said that "the ship is not liable for inaccuracies, obliteration," & c. But supposing that this condition can be read as meaning that the ship was not to be liable for non-delivery caused by inaccuracies, obliteration, & c., it would not relieve the defendant in this case from responsibility, because there is no evidence that the absence or obliteration of the word "Calcutta" caused the landing at Colombo. On the contrary, there is very good evidence that the casks were landed there simply by negligence, because it has been proved quite clearly that the marks given in the bill of lading (excepting the word "Calcutta") remained at all times quite distinct and legible on the casks, save in the case of the one which was injured. There might possibly have been some excuse for putting the injured cask ashore if it had become unrecognizable while on board (of which I may remark that there is no evidence), but there was no possible excuse as regards the other three, the marks on which were perfectly distinct. The captain undertook, by the bill of lading, to deliver them in Calcutta, and himself entered them in the ship's manifest (which he filed in the Custom House here) as goods to be delivered in Calcutta. And the treatment of the four casks shows that the defendant was well aware that the injured cask formed one of those covered by this bill of lading, and ought to go with the three that were uninjured and marked; therefore, there is no pretence for saying that the want of any mark on the injured cask (even if the ship was not responsible for the injury which caused the obliteration or absence of marks on this cask) led in any degree to their being put ashore at Colombo. If there were anything to show that the absence of the word "Calcutta" caused the mistake, the defendant might possibly have been discharged from liability, but there is no evidence of the sort.

4. The casks are still lying in Calcutta in the defendant's possession. On the 21st July, when they arrived by the Java, they were offered to the plaintiff on condition of his paying the forwarding charges, and the defendant's costs incurred in this action which had then

already been begun. The plaintiff very naturally declined this offer; but he expressed his readiness to receive the goods, and to withdraw the suit if the defendant would pay the costs which he had incurred up to that date. It seems to me that the plaintiff's offer was a fair and reasonable one. The defendant very foolishly did not accept it. The plaintiff is therefore entitled now to recover damages. The defendant has put forward another of the "conditions and exceptions" in the bill of lading, which, to some extent, applies to a case such as this. It is:--"In case any part of the within goods cannot be found during the ship's stay at the port of destination, they are, when found, to be sent back by first steamer at the ship's risk and expense, and subject to any proved claim for loss of market." But under the circumstances which have occurred, that clause does not affect this suit. For there is no evidence that the goods were sent by the first steamer; and so far from being sent at the ship's expense, delivery was refused except on the terms of the plaintiff paying the cost of forwarding them. It is a mere question of market-value. The actual cost of the goods was Rs. 935, which is certainly much lower than the market-rate at that time. The plaintiff claims at the rate of twelve annas per pound. I think ten annas per pound was about the rate of the day; and there will be a decree for damages at that rate. There will be a decree for Rs. 1,187-8; and the plaintiff is to give up to the defendant the shipping and Custom House documents for the goods on being paid the amount of the decree, including costs on scale No. 2.