

(1879) 08 CAL CK 0006

Calcutta High Court

Case No: None

Lee Phee Chuan

APPELLANT

Vs

Cossim Hossein
Soortu and Others

RESPONDENT

Date of Decision: Aug. 13, 1879

Citation: (1880) ILR (Cal) 477

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Pontifex, J.

The learned Judge in the Court below has held, upon the bill-of-lading in this case, that the shipowners had the right to land the goods, and charge for landing and wharfing; but he has given a decree to the plaintiff on the ground that there was no proof that the goods had been landed at the time when landing and wharfage charges were claimed.

2. It appears to me that there is no question in this case that the goods were landed and wharfed by the shipowners, and burnt.

3. I am unable to go as far as the learned Judge appears to have gone, and to hold that the shipowners were entitled to claim landing and wharfage charges, whether an opportunity had, or had not, been given to the plaintiff to land the goods himself. But I am of opinion that, for the speedy discharge of their vessel, the shipowners were entitled to land and wharf the goods, though not to charge for landing and wharfing, unless the plaintiff had an opportunity for landing the goods himself.

4. Under the words of the bill-of-lading, I think the shipowners were entitled to charge for landing and wharfing, only in default of the plaintiff failing to do so within a reasonable time; and I do not think the plaintiffs had been allowed a reasonable time for landing the goods himself, if they were in fact landed before 12 o'clock on the day after the ship's arrival.

5. In the late case of *Wright v. New Zealand Shipping Company L.R.*, 4 ED. 165, where it was necessary to define what was a reasonable time under ordinary circumstances for unloading, Lord Justice Cotton stated, that the question as to what might be a reasonable time depended on the facts of each case; but, speaking chiefly with reference to the case before him, said, that the charterer should be ready to unload, either when the ship arrives, or within a short time, such as a day or a couple of days after her arrival. In that case the shipper chartered the entire vessel, which was a sailing ship. In the present case, the ship was a general ship, and a steam ship; and the words of the bill-of-lading import I think, more urgency, and at least authorize the shipowners to land, without charging for it, and to place the goods in a godown.

6. In *Alexiadi v. Robinson* 2 F. F. 679 it was held, that the consignee was entitled to time to receive the necessary documents, and make the necessary entries at the custom-house.

7. It appears to me, that our decision in this case ought to rest on the simple question--Were the goods lost to the plaintiff by reason of an improper refusal by the defendants to give a delivery order? If yes, then the plaintiff would be entitled to recover. If no, then he had no cause of action.

8. With respect to the evidence, I am unable to arrive at the conclusion that the plaintiff made a definite tender of the freight, which was refused.

9. As I read the evidence, I take it that what happened was as follows:

10. The plaintiff, taking with him a person, who, if satisfied with its quality, proposed to purchase his tobacco, went to the defendants' office with the freight-money. But having been previously told at the wharf, by a servant of the defendants', whom the plaintiff's witness, Sooleyman Ahmadjee, describes as "the godown-keeper, a Chinaman," that his goods had been landed during the night, and were so covered by other goods, that they could not immediately be got at, he repeated this statement to the agent of the defendants at his office. Thereupon a loose conversation ensued, and the agent said, that if the goods had been landed, landing and wharfage charges would have to be paid. Indeed, at this time, as there was no certainty how many, if any packages had been actually landed, it must have been impossible for the defendants to have asked for a definite sum for landing, and I should have thought, that the natural place and time for demanding payment of these charges would have been the time of delivery at the godown. But, however this may be, the plaintiff made objection, but does not seem to have absolutely refused to pay the charges; nor did he insist upon a delivery order being given to him on payment of freight alone; nor in his plaint does he make any such case. If the plaintiff's objection had been admitted, and consented to, could the plaintiff have obtained his goods before the fire? I think the evidence goes to show, that he could not, as they were covered by other goods in the godown. And beyond that, if the

defendants were entitled for the speedy discharge of their ship to land the goods--as in my opinion they were entitled--the goods continued in their possession as carriers, in a place sanctioned by the bill-of-lading, and it seems to me that the defendants, as carriers, were entitled to a reasonable time for giving delivery, in the same way precisely as the plaintiff was entitled to a reasonable time for taking delivery, and I think that such reasonable time had not expired when the fire happened, and therefore that the accident was covered by the exception in the bill-of-lading.

11. In the case of *Alexiadi v. Robinson* 2 F. R. 679 the facts were, that before the goods were actually landed, the consignee, having his craft alongside, applied for the goods and tendered the freight; but the master refused to receive the freight without the order of the ship's agents, who had no representative on board; and the landing of the goods commenced and proceeded against the expressed wish to the contrary of the consignee.

12. The question, as put to the jury by Cockburn, C.J., was, in fact, whether the shipowner took the course he was entitled to take under the circumstances, in having the goods landed when the consignee was ready to receive them. And in that case, even after having been landed, the goods were actually at hand, but upon demand, delivery was refused, because payment of wharfage charges was objected to by the consignee.

13. In the present case, the evidence seems to me to show that the goods were never at hand, in the sense that the plaintiff actually applied for them and could have received them, but for the objection to pay landing and wharfage charges.

14. Upon the whole, therefore, I am unable to agree with the conclusion of the Court below; and I think the plaintiff's suit should have been dismissed but, under the circumstances, the goods having been landed for the defendants' convenience, without costs. I think, however, that the plaintiff should pay the costs of this appeal. The plaintiff may possibly be entitled to receive from the defendants some portion of the money realized by the sale of the damaged goods after the fire; but we cannot deal with that matter in this suit.

Richard Garth Kt., C.J.

15. This suit is brought by the plaintiff to recover damages for the non-delivery of certain goods, which were shipped from Calcutta to Rangoon, by the steamer *Fitzpatrick*, in December 1876.

16. The defence is, that the goods were landed in due course, and placed in a godown at Rangoon, and were there burnt by an accidental fire.

17. The *Fitzpatrick* was a general ship, and the bill-of-lading under which the goods were shipped contains a clause protecting the defendants: against any loss by fire; and it also contains another clause, which is important, for our present purpose, to

the effect, that "the goods were to be landed from the steamer's tackles at Rangoon by the consignees, as fast as the steamer could discharge, failing which, the steamer's agents were to be at liberty to land them into godowns, the cost of lighterage, godown's rent, &c., thereby incurred to be borne by the respective consignees."

18. The ship arrived at Rangoon on the 11th of December 1876, and was taken at once alongside the wharf. On the same evening, she began to unload; the goods of the several consignees into a godown upon the wharf, and continued to do so during the whole of that night and the following day, the 12th. The fire occurred at 7 o'clock on the evening of the 12th, and I think it sufficiently appears that the goods in question were burnt.

19. The plaintiff's agent, Esoop Ismail, who was the consignee of the goods in question, received his bill-of-lading soon after the arrival of the ship on, the 11th. He did not take any steps to obtain the goods on that day; and it seems doubtful whether he could have obtained his pass from the customhouse if he had applied for it. At any rate, he did not obtain it until the following morning (the 12th), and he then went to the wharf and asked the clerk who had charge of the godown, whether his goods had been landed. The answer was that they had been landed during the night, but that he could not have delivery of them till the next day, as other people's goods had been placed on the top of them. Esoop Ismail then went to the office of the defendants' agent, a Chinaman, named Singh Moh, and asked for a delivery order. The evidence is conflicting as to what passed on this occasion, but I believe Esoop Ismail's story to the effect, that Singh Moh claimed wharfage dues, and Esoop Ismail refused to pay them. In the afternoon of the same day, Esoop Ismail went again to look for his goods at the wharf, but could not find them.

20. Eventually, after the fire, he paid freight for the whole of the goods, and obtained a small portion of them. But on that occasion no wharfage was demanded or paid. As the goods were not forthcoming, of course no wharfage could have been payable; and therefore, the fact of no wharfage having been claimed after fire, is no argument in favour of the plaintiff.

21. In this state of facts, the learned Judge in the Court below decided in favour of the plaintiff. He held, that, under the terms of the bill-of-lading, the defendants had a right to commence unloading the ship immediately on its arrival, and if the plaintiff's agent was not there to receive the goods, they had a right to place them in the godown at once, and charge wharfage, rent, &c. But then the learned Judge considered, that there was no sufficient evidence that at the time when the plaintiff's agent was required to pay wharfage dues, and refused to pay them, the goods had been in fact landed in the godown, and, consequently, he decided that the charge for wharfage was improperly made, and that, as the refusal to pay it was the reason why the defendants' agent would not give the delivery order, the defendants must be held liable for the loss of the goods.

22. Now, the difficulty, which the learned Judge's view of the case presents to my mind, is this. If the goods were in the godown at the time when the wharfage dues were claimed, the plaintiff's agent might, no doubt, have obtained delivery of them; but in that case, the defendants' agent was justified in claiming wharfage, and Esoop Ismail was wrong in refusing to pay it. If, on the other hand, the goods were not in the godown at the time when wharfage dues were claimed, then the plaintiff's agent could not then have obtained them, even if he had received his delivery order, and I am by no means satisfied, that in that case the plaintiff's agent could or would, at any subsequent time, have obtained delivery of them, before the fire occurred.

23. The construction which I put upon the bill-of-lading is somewhat different from that which has been put upon it by the Court below.

24. I consider that it was not intended to relieve the defendants from their ordinary obligation as carriers to give the consignees a reasonable time to come and receive the goods from the ship, before they placed them in the godowns: see *Bourne v. Gatcliffe 3 Man. and Gr.*, 643 . On the contrary, the clause appears to me expressly worded so as to secure to the consignees the option of landing the goods, if they pleased, from the ship's tackles, and it was only in default of their being ready to receive them from the ship's tackles, that the defendants had any right to place them in the godown, and charge the consignees wharfage dues.

25. Moreover, the consignees were entitled, in my opinion, to a reasonable time to land the goods, if they so pleased, from the ship and if I were satisfied that Esoop Ismail was ready and willing to have landed the goods at the ship's tackles, if he had been allowed a reasonable time for that purpose, and that the defendants would not permit him to do so, I should certainly have acceded to the argument that has been pressed upon us by the plaintiff's counsel, that the defendants had no right to place the goods in the godown at all, and must be answerable for the consequences of having done so.

26. But it seems to me, that from first to last this was not in the plaintiff's case, or the plaintiff's complaint. He never testified in any way, as far as I can see, his wish or readiness to land the goods from the ship's side. Esoop Ismail never applied to the defendants' agent, or to the ship's officers, to be allowed to land the goods in that way. He asked for the goods on the morning of the 12th, not from the ship, but from the clerk who had the charge of the godowns; and when he was told by him that the goods were in the godown, he never complained either to the clerk or to the ship's agent that he had not had the opportunity given him of landing the goods from the ship.

27. Nor, again, when he wrote for compensation before bringing this suit, nor when the plaintiff stated his grievances in detail in his plaint, nor even in the conduct of the case in the Court below, do I find that any complaint was made, or evidence

offered, that Esoop Ismail wished or attempted to land the goods from the ship and was not allowed to do so. If he had put his complaint in this form, the defendants might have been prepared to prove more conclusively than they have done, that the plaintiff and the other consignees consented to the goods being unloaded into the godown. As it is, it seems to me that the facts all tend to show the plaintiff's acquiescence in the course that was taken.

28. None of the consignees, so far as I can see, either received, or asked to receive, their goods from the ship's side. No questions upon this point were put to any of the witnesses on either side. The consignees generally appear to have acted upon the assumption that the course which was taken by the ship was the right one; and though Esoop Ismail objected to pay the wharfage, he never complained that the defendants had no right to land the goods into the godown, or stated any other reason for his objections. It seems to me there fore, that it is a great deal too late now for the plaintiff to attempt to say, that he never had an opportunity given him of landing his goods from the ship, and that the course taken by the defendants, was improper.

29. That being my view of the case, the plaintiff's cause of complaint appears to me to resolve itself into the one point upon which the judgment in the Court below proceeded, namely, that although the defendants were justified in placing the goods in the godown, they had no right to charge wharfage for them, at any rate till the goods were actually there.

30. But, according to the construction which I put upon the bill-of-lading, if the defendants were at liberty to discharge the goods into the godown they were also entitled to charge wharfage dues.

31. If it were necessary to decide the point, I do not think that the statement of the godown clerk (even assuming it to be evidence at all, which I much doubt), would justify us in finding as a fact that the goods were in the godown, and covered up by other goods at the time when Esoop Ismail, the agent, applied for them.

32. But whether they were then in the godown or not, if the plaintiff's agent consented, as I think he did, to the goods being landed in that way, then I consider that the defendants' agent was justified, before he allowed him to have the delivery order, in asking him to pay the wharfage dues. I am not satisfied, as I have already stated, that if the plaintiff had obtained the delivery order when he applied for it, he would have been enable to get his goods from the godown before the fire occurred; but as he did not pay the wharfage dues, and consequently did not obtain the delivery order, I think that if the fault was anywhere, it was with himself.

33. In my opinion, therefore, the judgment of the Court below should be reversed, and the plaintiffs suit dismissed. I should have been disposed to have given the defendants their costs in both Courts: but in deference to the view of my learned colleague, I agree that they shall have their costs in this Court only, and not in the

Court below.

34. If the defendants have paid the costs in the lower Court, those costs must be refunded by the plaintiff.