(1964) 06 CAL CK 0022

Calcutta High Court

Case No: Suit No. 889 of 1958

Pannalal Kishanlal		APPELLANT
	Vs	
Osaka Shosen Kaisha and Another		RESPONDENT

Date of Decision: June 26, 1964

Acts Referred:

- Stamp Act, 1899 - Section 2(20), 7

Citation: 70 CWN 307

Hon'ble Judges: A.N. Roy, J

Bench: Single Bench

Advocate: N.C. Roy Chowdhury, for the Appellant;Subrata Roy Chowdhury and Tapas Kumar Banerjee for the Shipping Company and Arijit Chowdhury for the Insurance Company, for the Respondent

Judgement

A.N. Roy, J.

The plaintiff filed this suit for the recovery of Rs. 8,248.50 nP. against defendant No. 1 and decree for Rs. 8,065.20 nP. against defendant No. 2. Defendant No. 1 is the shipping company. Defendant No. 2 is the insurance company. On May 15, 1957 Messrs. Gangjee Premjee & Co. of Bangkok, it is alleged, caused 215 bags of Damar Batu to be shipped on board the ship "S.S. Bangkok Maru" belonging to the shipping company. It is also alleged by the plaintiff that the terms of carriage were recorded in the Bill of Lading dated May 15, 1957. The plaintiff claims to be the endorsee of the Bill of Lading. The plaintiff claims to be the endorsee of the Bill of Lading. The plaintiff further alleges that on May 9, 1957 Messrs. Gangjee Premjee & Co. insured the goods with the insurance company. The insurance was for the sum of Rs. 12,298-0-0 from the port of Bangkok until delivery. The plaintiff relied on a certificate of insurance dated May 9, 1957. The plaintiff alleges that the steamship arrived at the port of Calcutta in the middle of June, 1957, and started landing goods on or about June 20, 1957. The plaintiff''s case is that the plaintiff paid a sum of Rs.

1397.50 nP. on account of import duty in anticipation of the delivery of goods. The plaintiff''s further case is that the plaintiff received 74 bags and there was short delivery of 141 bags for which Commissioners for the Port of Calcutta issued a short certificate.

2. The further case of the plaintiff is that the shipping company offered to deliver certain unidentified and nil mark Damar Batu. On inspection the plaintiff found that the said Damar Batu was not the Damar Batu consigned to the plaintiff, and the same was spoilt, burnt, inferior in quality, unfit for consumption and was a portion of the goods landed as unmanifested excess in re-bagged burnt pieces.

3. The plaintiff alleges that the shipping company failed and neglected to deliver 141 bags. The plaintiff claims the value of the said 141 bags as loss suffered by the plaintiff.

4. The claim against the insurance company is on the allegation that the goods have been lost by one or more of the perils insured against by the defendant and the loss took place while in transit.

5. The shipping company denied liability. The shipping company did not admit the contents or quality or quantity or weight of the goods as alleged. The further allegation in the written statement is that the vessel carried large quantities of Damar Batu under different Bills of Lading, and a portion of the goods suffered some loss or damage arising or resulting from chemical action and/or fermentation and/or change of character and/or injury caused by other cargo in contact or proximity and/or wastage in bulk or other causes arising from inherent defect. It is also alleged in the written statement that the vessel landed as many original bags as were undamaged and the whole contents of all the remaining bags had to be rebagged and landed as sweepings. A total quantity of 86402 lbs. rebagged in 780 bags was landed. The shipping company alleges that the said 86402 lbs. of the goods were divided among the six claimants in proportions mentioned in the written statement and the shipping company tendered delivery of the plaintiff''s proportion of the goods, and that the plaintiff refused to take delivery of the same.

6. The insurance company in the written statement alleged that the certificate of insurance was issued subject to the terms and conditions of an open marine policy and the certificate of insurance did not specify the particular risk or adventure or the time for which it was made. The further allegation is that the certificate of insurance was not expressed in a sea policy and the certificate did not amount to a sea policy. A further contention is that the certificate is hit by the provisions of Section 7 of the Indian Stamp Act, 1899. The insurance company denied that the plaintiff was the endorsee or holder of the certificate of insurance or of any policy of insurance. The insurance company denied the other allegations in the plaint. The insurance company also contends that it is a non-resident foreign company and this Court has no jurisdiction to try this suit.

7. The following Issues were raised on behalf of the shipping company:--

1. Were 215 bags of Damar Batu shipped at Bangkok on the said vessel of the defendant No. 1 as alleged in paragraph 1 of the plaint ?

2. Did the goods shipped at Bangkok weigh approximately 16,770 Kgs ? Was the quality of the goods pure, original, unburnt, and not stonelike at the time of shipment ?

3. Is the plaintiff an endorsee or holder in due course of the said Bill of Lading for valuable consideration ? Did the property in the said goods pass to the plaintiff?

4. Did the defendant No. 1 fail to deliver 141 bags or any bag of Damar Batu to the plaintiff as alleged ?

5. Has the plaintiff suffered any loss or damage ? If so, for what amount ?

6. To what relief, if any, is the plaintiff entitled ?

8. The additional Issues raised on behalf of the insurance company were as follows :--

1. Does the defendant No. 2 carry on or did at any material time carry on business at No. 4, Fairlie Place, Calcutta through Messrs. Gladstone Lyall & Co. Ltd. as alleged ?

2. Is the certificate of insurance referred to in paragraph 5 of the plaint and the alleged contract for Sea Insurance contained in or referred to therein invalid or of no effect or hit by the provisions of Section 7 of the Indian Stamp Act ?

3. Is the plaintiff the endorsee or holder in due course or for valuable consideration of the said certificate of insurance or policy of insurance ?

4. Have the goods been lost by one or more of the perils insured against by the defendant No. 2 ?

5. Has this Hon''ble Court jurisdiction to try this suit against the defendant No. 2 ?

6. Has the plaintiff suffered any loss or damage ? If so, to what amount ?

7. To what relief, if any, is the plaintiff entitled ?

9. On behalf of the plaintiff there is oral evidence of the plaintiff. The other witnesses examined on behalf of the plaintiff are Ananda Gopal Ghose from the Customs House, Sudhir Kumar Bhadra from the Calcutta Port Commissioner''s Office and Iyer from the Indian Overseas Bank. There is no oral evidence adduced by the shipping company. On behalf of the insurance company there is the oral evidence of Tigram Alexander Carapiet, a Senior Assistant of Gladstone Lyall & Co. Ltd.

10. Ananda Gopal Ghose was asked to produce the order of the Board of Revenue allowing refund of the customs duty and he said that he had not brought any such

order. He produced the Manifest and the Bill of Entry. He stated that the Manifest was submitted by F.W. Heilgers & Company. The witness stated that he had no duty to perform in connection with the Manifest of a ship. With regard to the Bill of Entry the witness further said that he personally had nothing to do with the Bill of Entry. The witness proved certain signatures in the Manifest. In cross-examination the witness said that he had nothing to do with the papers of the Board of Revenue. With regard to the B form which is the abbreviation used for short landing certificate, the witness stated in cross-examination that the document might be in some other file. The evidence of this witness is of little aid to the plaintiff.

11. Sudhir Kumar Bhadra came from the Office of the Port Commissioners. He was asked about signatures on the outturn report and a letter from the Port Commissioners. Those were tendered as Ex. B/1 and Ex. C/1. In cross-examination he stated that he had no occasion to search for any document. The evidence of this witness is of no value to prove loss of any document. The witness did not state that he searched for any particular document nor did the witness state that on search he did not find the document.

12. The plaintiff''s evidence is that he received the Bill of Lading and other documents from the Indian Overseas Bank. About the insurance company carrying on business the plaintiff said in Q. 9:--

I import goods from foreign countries and I receive policies very often from Switzerland General Insurance Company and whenever there is a claim Messrs. Gladstone Lyall settle the claim and pay me the damages and they survey damages on behalf of the Insurance Company.

The plaintiff further said that there was shortage of 141 bags and the plaintiff met Mr. Carapiet of Gladstone Lyall & Co. in that behalf. The plaintiff said that along with the Bill of Lading he received the invoices, certificate of origin, certificate of insurance and the bank draft. The plaintiff said that he received delivery of 74 bags under the mark ''GPPK'' and then he reminded the shipping company for the balance of 141 bags, but he could not obtain delivery of the 141 bags from the steamer agent of the Port Commissioners. The plaintiff said that the Port Commissioners issued a short certificate and he sent the same to the Customs authorities for refund of duties. The plaintiff was shown in q. 61 copy of the short landing certificate and asked as to who prepared that copy. The plaintiff said that his typist prepared under his supervision, and that it was correct copy. The original was not tendered, nor was the loss of the original explained. The copy was not admissible in evidence and Counsel on behalf of the defendant objected to the admissibility of the copy, and I upheld the objection. The preparation of the copy was also not proved. The plaintiff stated that he went to the office of F.W. Heilgers & Co. and they informed him that 141 bags had not been landed and there was other cargo which the plaintiff could take. The plaintiff stated that he saw those goods and the bags were neither marked ''GPPK'' nor were any of the goods of the quality of

his goods. The plaintiff stated that he thereafter went to Carapiet of the insurance company and thereafter Carapiet accompanied the plaintiff to the jetty. The plaintiff further stated that the insurance company told him that the plaintiff could inform the shipping company to correspond with the insurance company. The plaintiff stated that thereafter there was an agreement dated May 12, 1958. The plaintiff stated that he did not take delivery pursuant to the delivery order because it was agreed that goods would be delivered after joint survey and the traders would not have to pay any charges of Port Commissioners. The plaintiff stated that the goods offered to him were of the value of Rs. 800/- or Rs. 900/- and he further said that the defendant shipping company did not pay the amount. The plaintiff stated that the invoice value of the goods was Rs. 7,500/-.

13. Tigram Alexander Carapiet on behalf of the Insurance company denied that he accompanied the plaintiff or that he ever admitted as to quality of the goods or that he ever told the plaintiff that he was willing to settle the claim. The witness further stated that Messrs. Gladstone Lyall & Co. were Claims Settling Agent of the Insurance Company and they settled claims, sent remittances and paid. The witness denied that Messrs. Gladstone Lyall did bargain or enter into insurance business on behalf of Switzerland General Insurance. The witness further stated that Gladstone Lyall acted as claim settling agent for forty foreign companies.

14. One of the important questions is whether 215 bags were shipped and the other important question is whether the shipping company failed to deliver 141 bags. Counsel on behalf of the plaintiff contended that the Bill of Lading was prima facie evidence of the shipment of 215 bags. It was contended that the statements in the Bill of Lading were not challenged and there was no suggestion that the goods as shipped were short of weight or damaged or burnt. It is also said on behalf of the plaintiff that freight paid would show that the weight was calculated and there was prima facie evidence of shipment of 215 bags. Counsel on behalf of the plaintiff also contended that the invoice would show that there were 215 bags and that the Certificate of Origin should be admitted in evidence under the Commercial Documents Evidence Act and it would appear from the Certificate of Origin that 215 bags were shipped.

15. Counsel for the plaintiff also relied on several documents being documents disclosed by defendant No. 1. Those are documents Nos. 9, 10, 11 and 12 appearing at pages 17, 18, 25, 37, 39, 46 and 48 of the brief of documents. Counsel for the plaintiff tendered all documents disclosed by the defendants and waived proof of such documents. Reliance was placed on document No. 4 dated 24 July 1957 to show that F.W. Heilgers & Co., wrote that a portion of the Damar Batu was discharged after being rebagged and that therefore there was an admission of not landing the entire consignment. The shipping company''s document No. 6 dated 12 August, 1957 written by F.W. Heilgers & Co., was also relied on by the plaintiff in support of admission of consignment of 215 bags and delivery of 74 bags leaving a balance of

141 bags not delivered by the shipping company to the plaintiff. The letter is as follows:--

With reference to 215 bags Damar Batu landed ex the above vessel under Line No. 133 and your Challan No. I. 2181 of the 5th June, 1957, we note from our records that 74 bags have been taken delivery of leaving a balance of 141 bags, which of course are lying in the Port Commissioners'' shed under ''NIL'' mark.

You will appreciate that your consignment being shipped under single gunny cover, the carrier shall not accept any liability for burst bags.

This letter was contended by Counsel for the plaintiff to show, first, that there was no delivery of 141 bags to the plaintiff and secondly, that the defendant''s case was that the goods had burst but the defendant shipping company adduced no evidence of the same and therefore the admission made by the defendant shipping company that 141 bags had not been delivered remains.

16. The third document disclosed by the shipping company, being document No. 7 dated 17 September, 1957 written by F.W. Heilgers & Co., was also relied on by the plaintiff. In that letter F.W. Heilgers & Co., wrote as follows:--

We.....would refer you to our letter of 12th August in which we requested to you to take delivery of 141 bags which are lying entirely at your risk and expense in the Port Commissioners'' shed. As your consignment was shipped under single gunny cover, the carrier shall not accept any responsibility for burst bags. We would add that the consignment was shipped under a qualified Mate''s Receipt.

''All second hand bags ship not responsible for cover torn, sticky, stained, short of weight and/or any condition of contents''.

This letter was relied on by the plaintiff in support of the contention that there was an admission of non-delivery of 141 bags and failure of the defendant to prove alleged burstings of bags.

17. The fourth document of the shipping company on which the plaintiff relied is the shipping company''s document No. 9 being agreement dated 12th May, 1958. In the recital of that agreement it is stated that certain quantities of Damar Batu were shipped and the parties of the one part claim the respective shortages of delivery.

18. The fifth document disclosed by the defendant on which the plaintiff relied is the shipping company''s document No. 10 being delivery order issued by Messrs. F.W. Heilgers & Co., to Port Commissioners asking them to deliver 18,008 lbs. of Damar Batu. It should be stated that this delivery order related to delivery of portion of Damar Batu rebagged.

19. The sixth document disclosed by the shipping company on which the plaintiff relied is the shipping company''s document No. 11 dated March 5, 1959 written by Messrs. Sandersons & Morgans to the plaintiff''s solicitor. This letter was similarly

relied on by the plaintiff to show that there was an admission of non-delivery.

20. The last document disclosed by the shipping company on which the plaintiff relied is the shipping company''s document No. 14 at page 49 where the shipping company''s solicitor offered to pay Rs. 833.60 nP.

21. Counsel for the plaintiff relies on section 3 of the Bills of Lading Act, 1856 and contends that every Bill of Lading shall be conclusive evidence of such shipment as against the Master or other persons signing the same notwithstanding that such goods may not have been so shipped. Similarly under Article 3(4) of the Carriage of Goods By Sea Act it is said that there is prima facie evidence of shipment by the production of the Bill of Lading. Counsel for the plaintiff relied on the decision in Smith & Co. v. Bedouin Steam Navigation Company, reported in 1896 A.C. 70 in support of the proposition that the evidence supplied by Bill of Lading is prima facie evidence of shipment. In Bedouin Steam Navigation Company''s case Lord Halsbury said--

In this case, undoubtedly, there was evidence that these goods which are now in dispute had been shipped on board this vessel. When I say there was evidence, I am not certain that one gets to any more definite idea of what the proposition is by calling it prima facie evidence, or by calling it by any other name which appears to diminish the value and the cogency of the evidence itself. Prima facie evidence may be very weak or prima facie evidence in the ordinary sense of the word may be very strong. I think it is a proposition which is attributed to Lord Wensleydale, although I have not been able to verify it, that a man cutting a tree in a field was prima facie evidence that he was seised in fee simple of the land.....In the particular case with which your Lordships have to deal there is a receipt.....it is a receipt for goods--that is what it amounts to--given by the person who was authorised to give the receipt for the goods for the express purpose of making evidence against the person who received them. Whether it is a receipt for goods or whether it is a receipt for money or whether it is a receipt for anything else, I suppose no one can doubt that without explanation and without showing that there was some mistake made in the receipt.....In truth it is when you come back to a mere question of fact : Were those goods received on board or not ? To my mind, no evidence has been given by the other side--no evidence at all--leading to any such conclusion as should upset the value, or the force, or the effect of the document so given.

With these words Lord Halsbury said that it being a question of fact there was no evidence to displace the evidence of the document viz., the Bill of Lading. It was held to be evidence of a cogent character not displaced by any other evidence, not shaken in its effect or value. It was declared in Bedouin Company''s case that if the fact were once established, that the person properly appointed for the purpose of checking the receipt of the goods had given a receipt in which he acknowledged that the goods were received, it would become the duty of those who attempted to get rid of the effect of that fact to give some evidence from which it could be

inferred that the goods were never put on board at all.

22. The other decision on which counsel for the plaintiff relied on is Owners of S.S. Draupner reported in 1910 Appeal Cases 450 in support of the proposition that the prima facie evidence would stand until it was rebutted. The third decision on which counsel for the plaintiff relied on is Compania Naviera Vasconzada v. Churchill & Si, reported in 1906 (1) K.B. 237 and on the observation appearing at page 247 where it was held that the words "shipped in good order and condition" were an affirmation of fact and they were not words of contract in the sense of promise or undertaking. It was further said in that case that the object of the shipper in asking for the insertion of the statement that the goods were in good condition at the time of shipment is clearly rather to have evidence to offer to the transferee that for his own direct benefit.

23. The question in the present case is whether the bill of lading by itself constitutes prima facie evidence of shipment. It had been the accepted view in the seventies of the last century that the signature of the Master on the bill of lading would be sufficient evidence of the truth of the contents to show the ship-owner the onus of falsifying them and to prove that he received a less quantity of goods to carry than was acknowledged by the agent. This was the view of Lord Justice Chelmsford in McLean and Hope v. Fleming, 1871 L. R. 2 S.C. and Div. 128. It should be stated that this opinion was given by Lord Chelmsford although in that case the bill of lading contained the words "weight, quality and contents unknown". The present statement of law appears to be that the opinion expressed by Lord Chelmsford is not to be preferred. In New Chinese Antimony Company Ltd. v. Ocean Steamship Company Ltd., 1917 (2) K.B. 664, the bill of lading containing the words of notation "A quantity said to be 937 tons" and a further notation "weight, measurement, contents and value (except for the purpose of estimating freight) unknown" came up for consideration. It was held that the bill of lading was not even prima facie evidence of the quantity of ore shipped, and that in an action against the ship-owners for short delivery the onus was upon the plaintiffs of proving that 937 tons had in fact been shipped. Viscount Reading, C.J., said:
I think that the true effect of this bill of lading is that the words ''weight unknown'' have the effect of a statement by the ship-owners'' agent that he has received a quantity of ore which the shippers'' representative says weights 937 tons but which he does not accept as being of that weight.

Viscount Reading, C.J., said that Sankey, J., in the Court below omitted to give proper effect to the words ''weight etc. unknown'' and that he based his judgment on the decision in Smith & Co. v. Bedouin Steam Navigation Co., (supra), one is likely to fall into error of relying on Smith & Co. v. Bedouin Steam Navigation Co. by overlooking the notation. In the Bedouin Steam Navigation Company''s case, as will appear from the report there were no words of notation exonerating the shipping company as is usually done by having the words of limitation regarding quality or quantity or

contents of the shipment. Counsel for the plaintiff contended that the doctrine in New Chinese Antimony Company Ltd. case should not be applied to the present case because it would amount to an extension of such words of limitation.

24. Lord Halsbury said in the Bedouin Steam Navigation case that the conclusion which should be arrived at is one that arises from facts in proof in the case and when dealing with questions of fact Lord Halsbury protested against laying down any rules that are not applicable to the case coming before the Court and each case in turn differs in circumstances in such a manner that in the course of cause the burden of proof might shift from one side to the other many times. These words of caution are necessary in order to appreciate first the primary onus of proof and secondly how far that matter in issue is proved, thirdly finding facts in the light of evidence.

25. In the present case it is said that production of the bill of lading is prima facie evidence of such character as would throw the onus of proof on the shipping company to disprove by the bill of lading. The bill of lading in the present case contains these words:

Shipped on board by the shipper hereinafter named, the goods or packages said to contain goods herein after mentioned, in apparent good order and condition.

Across the particulars set out in the Bill of Lading there is a notation:

Ship not responsible for cover torn, short of weight and or any condition of contents.

Clause 7 of the bill of lading is as follows:

The description of the goods and the particulars of the packages mentioned herein are those furnished by the shipper who warrants the accuracy thereof. The carrier shall not be concluded as to the correctness of marks, number, quantity, weight, gauge, measurement, contents, nature, quality or value. Weight and measurement are stated on the face hereof for the purpose of freight computation only and the carrier assures no responsibility for their accuracy.

Marten B in the case of Jessel v. Bath, L.R. 2 Ex. 267 said:

The person signing the bill of lading, by signing for the amount with this qualification weight, contents and value unknown merely means to may that the weight is represented to be so much but that he has himself no knowledge of the matter. The insertion of the weight in the margin, and the calculation of freight upon it, does not carry the matter any further ; he calculates the freight, as it is his duty to do, upon the weight as stated to him. The qualification is perfectly reasonable ; and I do not understand how a statement so qualified binds any one.

Bramwell B in the same case said:

A bill of lading so made out I think no one could be liable in such an action as the present.

Counsel for the plaintiff extracted from Scrutton, L.J.''s judgment in New Chinese Antimony Co. Ltd., case (supra) the analogy of ''box of jewels'' deposited for safe custody at a bank, and a receipt given for it in the words "received, contents unknown" that there would be no evidence of the receipt of any jewellery and that the present case was not of that character. In my opinion this analogy does not apply here for two reasons. The words "said to contain" in the bill of lading qualify the shipment declared in the bill of lading. It is true that those words relate to apparent good order and condition but the entire document is to be looked into and Clause 7 of the bill of lading to which I have referred states that the carrier shall not be concluded as to the correctness of number, quantity weight etc. Secondly the practice of signing a bill of lading in the present case that the carrier was not to be concluded as to the correctness of marks, numbers, quantity and weight amounts to this that he is not bound by any statement of the bill of lading with reference to matters specifically excluded. Applying these two principles the question is to be answered as to whether there is any evidence. If the agreement be that it is not to be received as concluding the matter stated there between the parties I fail to see as to how such a document which is the basis of the bargain between the parties that it is not to be conclusive of any facts stated therein can amount to prima facie evidence.

26. In the recent decision in Attorney-General of Ceylon v. Scindia Steam Navigation Co. Ltd., India. 1962 A.C. 60 the bill of lading with the notation "Weight, contents and value when shipped unknown" came up for consideration. There was shipment of rice from Burma to Ceylon. The bill of lading stated a total of 100.652 bags had been shipped in apparent good order and condition, "weight, contents and value when shipped unknown." The ship did not call at any intermediate port before reaching Colombo. There was a claim for damages for short delivery of 235 bags. The plaintiff there relied on the bill of lading and it was held by the Appellate Court to afford prima facie evidence of the number of bags of rice that were taken on board the ship. In dealing with the question of evidence the Judicial Committee said that the first question was whether the plaintiff had shipped at Rangoon for delivery to the Director of Food Supplies at Colombo. It was said that the onus of proof of facts rested upon the plaintiff. The defendant there contended that the bill of lading did not yield prima facie evidence of the number of bags that had been shipped. The Judicial Committee said that this statement in the bill of lading as to number of bags shipped did not constitute conclusive evidence against the ship-owner, they formed strong prima facie evidence that the stated number of bags were shipped unless there was some provision in the bill of lading which precludes the result. In that case the terms: "weight, contents and value when shipped unknown" were construed to mean that in signing a bill of lading there was disclaimer of knowledge in regard to the weight or contents or value of such bags, but there was no disclaimer as to the

number of bags. That is the ratio decidendi in the Scindia Steam Navigation case. It is essentially a question of bargain or contract between the parties. In the present case I am of opinion that there is specific disclaimer as to number. Taking into consideration the principles to which I have referred and the decision on which counsel relied and which were cited at the Bar the proposition is that a bill of lading disclaiming liability as to number of quantity is first not conclusive against the ship-owner and secondly it does not offer any prima facie evidence and has no probative value. I am therefore of opinion that the bill of lading does not amount to prima facie evidence.

27. The other documents on which counsel for the plaintiff relied do not in my opinion assist the plaintiff. The reasons are these. The certificate of origin is in my opinion not embraced within the Commercial Documents Evidence Act. The Commercial Documents Evidence Act states that the Court shall presume in relation to document included in Part I of the Schedule and in relation to documents mentioned in Part 2 of the Schedule the Court may presume the document to have been made by or under appropriate Authority and the statement contained in are accurate. As to the certificate of origin it will appear in Part I that the Certificate of origin of goods issued by a recognised Chamber of Commerce or by an Indian or British Consular Officer by an Indian or British Trade Commissioner or Agent is included in the category of documents, the authenticity and genuineness of which are presumed under the Act to be correct. In the present case the certificate relied on does not come within any of the limbs of item No. 18. There is no evidence that the document is issued by any Chamber of Commerce. On the contrary the intrinsic evidence forbids such an assumption. Further, the certificate of origin does not show any quality of goods. Secondly, if the plaintiff wishes to rely on documents disclosed by the defendant the admission will have to be taken in entirety against the defendant. Such admission will amount to this that the goods which the plaintiff shipped were found to be in bags which burst, and thereafter had to be rebagged and the shipping company offered the same. The plaintiff''s evidence is that they were not the goods that the plaintiff had shipped. The plaintiff has to accept the goods offered by the defendant if the plaintiff wishes to proceed on the basis of admission and in that event the plaintiff''s suit has to fail. I am therefore of opinion that the plaintiff is unable to extract any admission from any of the documents that there was shipment of 215 bags. On the contrary any reliance on the documents will show that there has been lading of all the goods and the 141 bags complained of are within the goods which were offered by the shipping company to all the six holders of the different Bills of Lading in respect of the consignment of Damar Batu which on landing were rebagged and offered to them.

28. There was a faint suggestion that the plaintiff had obtained refund of Customs duty and therefore there was evidence that the plaintiff did not receive the entire consignment. The papers of Board of Revenue were not kept by the witness who came from the Customs House and he was not competent to speak of the loss of

this document. I have already stated that there is no evidence of loss of original B form nor is there any evidence of loss of any order of refund made by the Board of Revenue. It is strange that when no one was called from the Port Commissioners about. B form an argument was advanced on behalf of the plaintiff that in such a case if the defendant did not produce any evidence, such conduct should be condemned, I fail to see why a business organisation should be condemned just because it does not offer any evidence. It is a matter of advice that such organisation receives and they are at liberty to offer evidence or not to offer evidence according to the advice. It would be wrong on principle to condemn such business organisation. On the contrary, if I have to say about commercial suits it appears to me that whenever there is any case of loss or shortage of goods, the first thing which any litigant wishes to do is to preserve the evidence which may be of assistance to him. The first and foremost duty of a litigant in such a case is to call upon the authorities to preserve its document because of the litigation that he may launch. Documents can be preserved and evidence can be available if one is inclined to take necessary steps for the proper conduct of a suit in a diligent manner.

29. Counsel for the shipping company in my view rightly contended that if no evidence had been offered by the plaintiff it was not incumbent upon the defendant shipping company to adduce any evidence. The only question was about shipment. The onus of proof was on the plaintiff and I am of opinion that the plaintiff has failed to prove that onus.

30. Issue No. 1 raised by the shipping company is answered against the plaintiff.

31. Issue No. 2 relates to weight and quality of goods. There is no evidence offered as to the weight or of quality. In the particulars supplied by the plaintiff to the shipping company by the plaintiff''s letter dated August 16, 1958 the plaintiff through his Solicitor gave particulars of paragraph 10 of the plaint as follows:--

(a) Damar Batu as consigned was of pure origin. You are not entitled to any other particulars.

(b) The particulars asked for by you are matters of evidence. The entire quantity which was offered to our clients was spoilt, burnt and/or badly damaged.

(c) The quality of the Damar Batu shipped was pure and original. Damar Batu offered to our clients was not the Damar Batu which was consigned and was found to be spoilt, burnt and badly damaged and of no market value.

(d) Market value of the Damar Batu as consigned was about Rs. 70/- per unit. Your clients are not entitled to ask for rest of the particulars.

There is no evidence offered as to the quality or character of the goods shipped. Issue No. 2 raised by the shipping company is therefore answered against the plaintiff.

32. As to Issue No. 3 there was oral evidence, and the same was not challenged by the shipping company. Counsel for the shipping company did not resist the plaintiff''s claim on the ground of endorsement of the Bill of Lading in favour of the plaintiff. Issue No. 3 is answered in favour of the plaintiff.

33. As to Issue No. 4 I am of opinion that there is no evidence of failure to deliver 141 bags. Issue No. 4 is answered against the plaintiff.

34. There is no evidence of loss or damage suffered by the plaintiff. Further, in view of my conclusion on the earlier Issues the plaintiff is not entitled to any relief.

35. As for the insurance company two main questions arise, first, whether the insurance company carries on business at 4, Fairlie Place and secondly, whether the certificate of insurance can be sued upon. I have already referred to the oral evidence adduced by the plaintiff that the defendant insurance company settles claims or pays claims. Counsel for the plaintiff has contended that settlement of claims or settlement of debts is carrying on business. He relied on the decision of the Judicial Committee in Goswami Shri 108 Shri Girdhariji Shri Govindraiji Maharaj v. Shri Goverdhanlalji Girdhariji, reported in 21 I.A. 13 on the observations appearing at page 15. Lord Morris said:

The phrase ''carry on business'', as has been often said, is elastic one, and is almost incapable of definition. The Tribunal must in each case look to the particular circumstances. It appears to their Lordships that the Letters Patent intended to relate to business in which a man might contract debts; and ought to be liable to be sued by a person who had business transactions with him.

Reliance was placed on this decision in support of the proposition that the insurance company would be carrying on business by being exposed to the liability of contracting debts, and that would amount to business. It is said on behalf of the plaintiff that the settlement of claim is contracting debts. Counsel for the insurance company relied on three decisions. The first is Pachaiammal & anr. v. Hindusthan Co-operative Insurance Society Ltd., reported in AIR 1941 Mad 270. In that case it was held that "a company only carries on business where it enters into contracts relating to its business, not at places where it may have canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary to its business. Hindusthan Co-operative Insurance Society had its Head Office at Calcutta and Branch Office at Madras and the contracts of insurance were made in Calcutta and not in Madras and it could not be said there that the company was carrying on business in Madras within the meaning of Clause 12 of the Letters Patent. The Madras case referred to contains two important decisions. The first is reported in 1896 A.C. 325. That is case of Grainger & Son v. William Lane Gough, the other one is F.L. Smith & Co. v. F. Greenwood, reported in 1921 (3) K.B. 583. Smith''s case is the second decision on which Counsel for the insurance company relied in the present case. The question arose in Grainger''s case as to whether a foreign merchant, who

canvassed through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, did not exercise a trade in the United Kingdom within the meaning of Income Tax Acts. Lord Herschell said:

If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes stores and sells his goods.

Payment of debts of settlement of claims through an agent is in my opinion neither carrying on trade nor is it soliciting any business. In Grainger''s Lord Loreborn said that the true rule was that a company resided for the purpose of income tax where its real business was carried on and the real business was carried on where the central management and control actually abode.

36. In Smith & Co.''s case the question for consideration was whether a non-resident person would be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, or agency within the meaning of the English Finance Act. The respondents there were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery which they exported all over the country. They had an office in London in charge of a qualified Engineer who was their wholetime servant. He received inquiries for machinery such as the respondents could supply, sent to Denmark, particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in working it. The contracts between the respondents and their customers were made in Copenhagen and the goods were shipped f.o.b. Copenhagen. The Revenue Commissioners held that the respondents exercised a trade within the United Kingdom. That decision was reversed by Rowlatt, J. An appeal was preferred and in the Court of Appeal consisting of Lord Sterndale, M.R. Atkin, L.J. and Younger, L.J. it was held that the place where a trade was exercised was the place where the transactions forming the alleged business were closed, in the case of a selling business by the sale of the commodity, and the profit thereby realised, and that therefore the respondents exercised their trade in Denmark, and that they could not in respect of the same profits and gains exercise their trade elsewhere. It was further held that assuming that the London office was branch of the respondents'' business, the respondents could not be assessed through it upon the profits which they made by trading with this country. Atkin, L.J. said.

There are indications in the case cited, (the case cited was Grainger & Son v. William Lane Gough, 1896 A.C. 325) and other cases that it is sufficient to consider only where it is that the sale contracts are made which result in a profit. It is obviously a very important element in the inquiry, and if it is the only element, the assessments are clearly bad. The contracts in this case were made abroad, but I am not prepared

to hold that this test is decisive.....I think that the question is, where do the operations take place from which profits in substance arise ? To my mind there is no evidence in the present case of any other place than Denmark.

Counsel for the insurance company in my view rightly contended that there was no evidence in the present case that any profit was made by the insurance company from this place or that any insurance business was carried on by the insurance company within the jurisdiction of this Court.

37. The third decision on which counsel for the insurance company relied is Guardian Assurance Co. v. Shiva Mangal Singh, reported in ILR 1937 All 234. Sulaiman, C.J. said that a foreign company which got itself registered under the Indian Companies Act would be a company carrying on business in India and where such a company employed an authorised agent, rented a room in the premises of the agent for the office of the company, wrote up their name in the office and carried on their business at that office, the company would be carrying on business within the meaning of Clause 12 of the Letters Patent. The true index of carrying on business is making of contracts, making of profits and entering into contracts of insurance in any particular case. There is no evidence that any contract of insurance was or is carried on by the insurance company through Gladstone Lyall & Co. Further, counsel for the insurance company in my view rightly contended that even if it could be assumed that Gladstone Lyall & Co. were settling claims they were doing so not for this insurance company but for 40 other companies and therefore they would not be a recognised agent of any particular insurance company carrying on business through a particular agent.

38. Counsel for the insurance company also relied on the commentary in Mulla''s CPC u/s 20 and contended that either there would be a special agent or a share in gain or loss would have to be found out. He relied on Mulla''s Code of Civil Procedure, 12th Edition, page 119 where the phrase ''carrying on business'' is explained. In my view counsel for the insurance company is right in his contention for the reasons given above that the insurance company did not carry on business within the jurisdiction.

39. The second contention on behalf of the Insurance company is that the policy in the present case is not enforceable. The plaintiff relies on a certificate of insurance. The copy is annexed to the plaint and is marked annexure "A". The copy of the certificate of insurance is as follows:--

ANNEXURE "A"

Switzerland.

Original.

Bangkok, 9th May, 1957.

CERTIFICATE OF INSURANCE NO. 259. Policy No. 7170.

This is to certify that Messrs. Gangjee Premjee & Company have insured the under-mentioned shipment subject to all clauses and conditions of the company in the printed form of policy as follows:--

Description of Interest

G R 215 bags Damar Batu

P K each bag said to weigh

78 kg. nett or 79.1 kgs.

CALCUTTA gross packed in heavy cess green stripped new single gunny bags.

by s.s. "Bangkok Maru" sailing on abt. 14th May, 1957 from Bangkok, Thailand to Calcutta.

Insured value Indian Rs. 12,298 (INDIA RS. TWELVE THOUSAND TWO HUNDRED AND NINETY EIGHT ONLY).

Condition of Insurance

Warranted subject to Institute Cargo Clauses (All Risks) institute strikes clauses "Both to include extended cover" institute War Clauses and Institute Theft Pilferage clauses attached to the open Policy including the Risk of Non-delivery, riots, civil commotions, warehouse to warehouse, weting, heating, cracking, damage caused by sea, rain and/or fresh water, salt water, nails, hooks, oil, mud, acid, crease, fire, sling, stain, other external causes and/or contact with other cargoes, shortage of entire bag, shortage in weight and/or loss of contents irrespective of percentage due to tearing, rough handling, slacking, breakage, leakage, bursting and mouth bursting of bags.

The contentions on behalf of the Insurance Company are first, that there is no mention of policy in the certificate, secondly, that it is an open policy not for specified events and thirdly, the plaintiff is not possessor of a policy and it is not proved that he is endorsee or holder of certificate. It will appear that the certificate states that Gangjee Premjee insured the consignment subject to clauses and conditions in the Company''s printed form of the policy. What the clauses and conditions of the printed form of the policy are, is not in evidence. What the policy is, is not known. Counsel for the Insurance Company in my view rightly contended that a certificate is not the complete contract and the words in the certificate to the effect that "Gangjee Premjee insured the shipment subject to clauses" leave the matter at large.

Counsel for the plaintiff contended that it was not necessary to take any particular written policy and u/s 2(20) of the Indian Stamp Act a policy of sea insurance or sea policy could be proved by the certificate. Counsel for the Insurance company relied

on section 7 of the Indian Stamp Act which consists of the following conditions. That no contract for sea-insurance shall be valid unless the same is expressed in a sea-policy and no sea-policy made for time shall be made for any time exceeding twelve months and no sea policy shall be valid unless it specifies the particular risk or adventure, or the time, for which it is made, the names of the subscribers or underwriters, and the amount or amounts insured against and where any sea insurance is made for or upon a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at a destination and been there moored at anchor, the policy shall be charged with duty as a policy for or upon a voyage. Counsel for the plaintiff relied on Tricambji v. Verji Kanji, reported in AIR 1923 Bom. 142 in support of the contention that certificate of insurance would suffice. In the Bombay case protection note was issued and it was held that the protection note satisfied the definition of policy of insurance in the Indian Stamp Act. Counsel for the Insurance Company relied on the well-known decision in Surajmull Nagarmull v. Triton Insurance Company, 52 I.A. 126. A suit was brought there to recover damages for breach of a contract to insure jute and hemp to be exported to Europe. The Insurance Company there contended that there was no contract for sea insurance within the meaning of section 7 of the Indian Stamp Act. That statutory requirement was neither pleaded nor was it referred to in Courts, in India. The Judicial Committee in dealing with that contention said that no Court could enforce as valid that which competent enactments had declared shall not be valid. The expression of an agreement for sea insurance, otherwise than in a policy, is forbidden in the public interest, and the statutory insistence on a policy is the real language of the statute. There being no policy it was held to be unenforceable. In the present case there is no evidence of policy. It is at the same time incumbent that there has to be a sea policy. A sea policy which is not in compliance with the Indian Stamp Act is prohibited. The effect of such prohibition is that it is unenforceable. I am, therefore, of opinion that this contention of the Insurance Company is correct.

I, therefore, answer issues 1 and 2 raised by the Insurance Company in their favour and against the plaintiff. Of the other issues number 3 is not necessary to be answered. There is no evidence to answer Issue No. 4 in favour of the plaintiff. There is no jurisdiction of this Court to try the suit against the defendant No. 2. No leave under Clause 12 of the Letters Patent is taken. Issue No. 6 has been dealt with before. The suit is, therefore, dismissed with costs to both the defendants.