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**Court :** Kolkata

**Decided On :** Jul-17-1928

**Reported in :** AIR1929Cal260,117Ind.Cas.851

**Appellant :** J. Ezekeil

**Respondent :** British India Steam Navigation Co. Ltd. and anr.

**Judgement :**

1. The plaintiff is the owner of a business in miscellaneous stores in Akyab. In August 1921 he sent a wire to Messrs. Lipton Limited in Calcutta for despatching to his Akyab firm 25 cases of Lipton's white label tea. Messrs. Lipton Limited received the order on 23rd and on the next day i.e., the 24th, they booked at the office of the Rivers Steam Navigation Co. Ltd. at Jagannathghat a consignment of 25 cases, each case containing 64 one pound tins, of tea. The total weight of the consignment as entered in the forwarding note was 34 mds. 311/2 seers, and the value was declared to be Es. 1,850 and it was entered therein that the consignment was to be carried to Akyab via Chittagong. The cases were carried on a ship belonging to the Rivers Steam Navigation Co. Ltd. up to Chittagong, where they were transhipped to a ship belonging to the British India Steam Navigation Co. Ltd. which carried them to Akyab on 14th September 1921. The plaintiff's agent at Akyab was informed by the coolies who carried the goods from the ship to the wharf that the weights of the cases were remarkably low. On that the agent demanded an open delivery which, however, was refused. The agent then approached the Collector of Customs and the Wharf Superintendent, and ultimately the cases were opened and an inspection of the goods held and it was found that of the 25 cases, 6 cases were entirely empty of tea, but filled with various sorts of rubbish, six cases were quite in tact as regards their contents, while the contents of the remaining 13 cases had been partly abstracted. The plaintiff instituted this suit for a breach of the contract of carriage and prayed for recovery of Es. 931-15-0 being the value of the quantity of tea abstracted and Es. 207-8-0 being the damages caused by non delivery. The suit was laid against the British India Steam Navigation Co. Ltd. as defendant 1 and the River Steam Navigation Co. Ltd. as defendant 2.

2. It has been found as a fact by both the Courts below that the goods were lost in transit between Chittagong and Akyab. The trial Court absolved defendant 2 and passed a decree for Es. 936-4-0 with costs against defendant 1. The latter preferred an appeal with the result that the District Judge who heard the appeal allowed it and dismissed the suit but made no order for costs.

3. The District Judge, while finding all the facts in plaintiff's favour held that the consignment was covered by a bill-of-lading issued by the British India Steam Navigation Co. Ltd. which contained amongst others the clause:

The company shall not be liable for loss, damage or delay directly or indirectly resulting from any of the following causes or perils howsoever, occasioned; viz., act of God, King's enemies, piracy, robbery, theft or pilferage with or without violence on board or elsewhere, and whether by persons in the service of the company or not, &c.; &c.;

4. The plaintiff has then preferred the present appeal. His contention is that defendants are bound by the conditions that are mentioned on the back of the forwarding note, and it is those conditions and not the conditions in the bill-of-lading that represent the contract of carriage, and that the risks in respect of which the bill-of-lading absolved the companies being different from and somewhat inconsistent with those mentioned on the back of the forwarding note were not those that had been bargained for when the goods were consigned, the bill-of-lading having in fact been delivered to the consignor several days after the goods were consigned. It is also contended that when the goods were consigned a cutcha receipt called the Mate's receipt was given to the consignor which was subsequently taken back in exchange for the bill-of-lading, and as the same was not produced by the defendants, an inference should be drawn against the defendants and it should be held that the goods were consigned on a different contract. Lastly, it is argued that defendant 2 is, in any case liable as the bill-of-lading was issued by defendant 1 only and the forwarding note was the only document that passed between the plaintiff and defendant 2.

5. The two defendant companies have appeared separately in the appeal and have replied to these arguments.

6. Now, the goods were consigned on 24th August 1921 and the forwarding note contained the following clause which was signed by Messrs. Lipton, Limited:

I hereby certify that I have satisfied myself that the description, marks, weight and quantity and class of goods consigned by me and all entries have been correctly entered in the forwarding note and the goods have been marked by the Company's staff on my identification and also that no undeclared jewellery and/ or excepted articles as notified in the Schedule to the Common Carriers Act are contained in these goods and/ or luggage and I agree to abide by the conditions endorsed hereon.

7. The forwarding note remained with defendant 2 and what was given to the consignor was a Mate's receipt. This Mate's receipt was within two or three days as the evidence shows, returned by the consignor in exchange for the bill-of-lading that he obtained, the bill-of-lading which bore date 24th August 1921 and purported to cover the entire journey from Calcutta to Akyab via Barisal and Chittagong and referred to Invoice No. 78 of 24th August 1921. The bill-of-lading was issued by defendant 1 and expressly stated that the goods were to be carried and delivered 'subject to the terms and conditions of this bill-of-lading.' It may be said here that the bill-of-lading enlarges upon the forwarding note as regards the risks that are to be excepted.

8. The first question that arises upon the aforesaid facts is what was the contract between the parties. The abstract question whether the bill-of-lading is a conclusive statement of the contract between the shipper and the shipowner, or is only one piece of evidence, helping with others to show what that contract is-a question which is dealt with in Carver's Carriage by Sea, 7th Edition, Section 56, and is a matter upon which there is some conflict of authority-does not call for an answer in the present case. If it concludes the parties, defendant 1 is at once absolved covering as it does the entire journey. If other or extraneous evidence is admissible to prove the agreement between the parties the mere production of the forwarding note will not help the plaintiff, but some evidence will necessarily have to be given to show that the consignor did not expect the terms and conditions of the bill-of-lading to be incorporated into the contract or that the terms and conditions are out of the ordinary or that the circumstances are such as would indicate that the consignor did not bind himself to abide by all or any of those terms and conditions. It may also be, as has been said' in the passage referred to above, that as the bill-of-lading is not usually signed until after the goods have been shipped, it may contain terms not agreed upon at the time of shipping, or that it varies or omits some of the terms as then understood. Of all these, however, there is not a particle of evidence on the record. On the other hand, the consignors being exporters on a large scale must be presumed to have been aware of the terms and conditions, which are nothing but quite ordinary in a bill-of-lading of sea-going vessel. Moreover as observed by McCardie, J. in *Armour & Co. v. Leopold Walford (London)* [1921] 3 K.B. 473 at p. 477:

Whatever the prior express bargain has, been, a shipper-is free to accept any bill-of-lading he chooses ; if therefore he has chosen to receive without protest a bill-of-lading in a certain form he should ordinarily be bound by it.

9. Further than that, the plaintiff suffers from a further infirmity. Far from repudiating the contract as contained in or at least 'evidenced by the bill-of-lading, he, as endorsee' of the bill-of-lading, produced it as entitling him to the goods and took delivery of the goods on the strength of it. In para 2 of the plaint he , set out-this through bill-of-lading from Calcutta to Akyab via Barisal and Chittagong and as referring to Invoice No. 78 dated 24th August 1921. Indeced it is on the basis of this of this bill-of-lading that he has instituted this suit, and he cannot be heard to say that he is not bound by its terms. In *Glyn v. East and West India Dock Co.* [1882] 7 A.C. 591 at p. 596 Lord Selborne said:

Every one claiming as assignee under a bill-of-lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill-of-lading, although by mercantile law and usage it is a symbol of the right to property in the goods, is to express the terms between the shipper and the shipowner.

10. In the above view of the matter no other contention of the appellant need; be considered. The appeal, in our opinion, cannot succeed and must be dismissed, but we do not propose to make any order for costs.

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