Privy Council Appeal No. 20 *of* 1958

Sze Hai Tong Bank Limited - - - - - - - *Appellant*

v.

Rambler Cycle Co., Limited - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF THE COLONY OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE, 1959

Present at the Hearing:

LORD DENNING
LORD JENKINS
MR. L. M. D. DE SILVA

[*Delivered by* LORD DENNING]

The Rambler Cycle Company Limited manufacture bicycles in England and export them to various parts of the world, and in particular to Singapore, where they have customers called the Southern Trading Company. In 1954 these customers ordered bicycle parts to the value of nearly £3,000 from the Rambler Cycle Company. Payment was to be 90 days, documents against payment. The Rambler Cycle Company made the goods and sent them off to Singapore. They shipped the goods on the steamship "Glengarry", which belongs to Glen Line Limited, and they paid the freight in advance. The steamship company issued a bill of lading dated 30th July, 1954, in which they acknowledged that the goods were shipped by the Rambler Cycle Company and were to be conveyed by the ship "Glengarry" and were to be delivered at the port of Singapore "unto Order or his or their assigns". There was noted on the bill of lading a request by the Rambler Cycle Company saying: "Notify: Southern Trading Company, C Short Street Singapore". The Rambler Cycle Company insured the goods through Lloyds and obtained an insurance certificate. This covered the goods during the voyage and for 90 days thereafter. The Rambler Cycle Company also drew a bill of exchange on the Southern Trading Company for the amount due. This was payable 90 days after acceptance. The Rambler Cycle Company also made out an invoice for the goods. The Rambler Cycle Company took all these documents to the Bank of China in London, who passed them on to their branch in Singapore. This branch was to hold them until the bill of exchange was paid and also any charges.

On 1st September, 1954, the ship "Glengarry" arrived in Singapore The ship-owners had agents there called Boustead and Company, who acted for them in every way. On the authority of these agents, on the 2nd and 3rd September, 1954, the goods were discharged from the ship and placed in the go-downs of the Singapore Harbour Board. (This was done, no doubt, under clause 10 of the bill of lading "at the risk and expense of the owners of the goods"). These shipping agents also wrote to the Southern Trading Company to notify them of the arrival of the goods. The Southern Trading Company wished to get possession of the goods but did not want to pay for them at that time. So they went along to their own bank, the Sze Hai Tong Bank Limited, and

got that bank to sign a form of indemnity in favour of the ship-owners, agreeing that, if the goods were released to the Southern Trading Company, they would indemnify the shipping company against any loss thereby occasioned. The indemnity was signed both by the Southern Trading Company and the Sze Hai Tong Bank and dated 3rd September, 1954. When the shipping company's agents received that indemnity, they authorised the Harbour Board to deliver the goods to the Southern Trading Company. The shipping company's agents never saw the bill of lading. It was not produced to them. It was, of course, still in the hands of the Bank of China, who would not deliver it except against payment. Yet the shipping company's agents issued a delivery order for the goods in favour of the Southern Trading Company. On 4th and 6th September, 1954, the goods were removed from the Harbour Board premises by the Southern Trading Company.

The shipping company's agents were quite frank about what they did. Their representative said in evidence: "In issuing delivery orders and in everything we do we act as agents for the Glen Line. It is an accepted fact that, in absence of bills of lading, goods are released on an indemnity. I agree we are supposed to deliver on the bill of lading being produced to us. I agree that, when we do not have the bill of lading produced, we cover ourselves by getting an indemnity. When it is suggested to me that we get these indemnities because we know we are doing what we should not do, I say that if no risk, we would not need indemnity. I agree we get indemnity because we are doing something we know we should not do, but it is common practice. It is an everyday occurrence. We rely on the bank's guarantee".

The Southern Trading Company never did pay for the goods. They did not pay the draft. The Rambler Cycle Company did not know the goods had been delivered to the Southern Trading Company. They assumed that the goods had remained in warehouse at Singapore. They arranged for the insurance to be extended beyond the 90 days for two further periods of 30 days each consecutively. Eventually, in January, 1955, they discovered what had happened and in August, 1955, they brought an action against the shipping company claiming damages for breach of contract or for conversion. The shipping Company brought in the Southern Trading Company and the Sze Hai Tong Bank as third parties, claiming that they were entitled to be indemnified by them.

The action was tried by Whitton, J., in the High Court of Singapore. He gave judgment for the cycle company against the shipping company for £3,005 11s. 6d., and also made a declaration that the shipping company were entitled to be indemnified by the third parties. The shipping company did not appeal but the Sze Hai Tong Bank did so. The Court of Appeal of Singapore (Knight, Acting C.J. of Singapore, Thomson, C.J. of Malaya, and Chua, J.) dismissed the appeal. The Sze Hai Tong Bank now appeal to Her Majesty in Council. The contest before their Lordships has been solely whether judgment was properly entered against the shipping company: for if it was, the Sze Hai Tong Bank recognise they are bound to indemnify the shipping company.

It is perfectly clear law that a ship-owner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was "unto Order or his or their assigns", that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by section 2 of the bill of

lading, which says that: "During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this Bill of Lading that may be inconsistent therewith, viz. (*a*) so long as the goods remain in the actual custody of the carrier or his servants" (here follows a specified exception); "(*b*) whilst the goods are being transported to or from the ship" (here follows another specified exemption); "(*c*) in all other cases the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom".

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: "Of course not". There is therefore an implied limitation on the clause, which cuts down the extreme width of it: and, as matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.

But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, "unto order or his or their assigns", against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract, see *Glynn* v. *Margetson & Co.* [1893] A.C. 351, at p. 357; *G. H. Renton & Co.* v. *Palmyra Trading Corporation of Panama* [1956] 1 Q.B. 462 at p. 501, [1957] A.C. 149, at p. 164.

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. For that is what has happened here. The shipping company's agents in Singapore acknowledged: "We are doing something we know we should not do". Yet they did it. And they did it as agents in such circumstances that their acts were the acts of the shipping company itself. They were so placed that their state of mind can properly be regarded as the state of mind of the shipping company itself. And they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause, see *The Cap Palos* [1921] P.458, at p. 471.

The appellants placed much reliance, however, on a case which came before their Lordships' Board in 1909 of *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Company Ltd.* [1909] A.C. 369. There was there a clause which said that "in all cases and under all circumstances the liability of the Company shall cease when the goods are free of the ship's tackle". The goods were discharged at Penang and placed in a shed on the jetty. Whilst there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability.

Their Lordships are of opinion that that case is readily distinguishable from the present, as the courts below distinguished it, on the simple

ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that, in the absence of an exemption clause, the shipping company might have been held liable for his fraud, see *United Africa Company* v. *Saka Owoade* [1955] A.C.130. But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agents at Singapore can properly be treated as the action of the shipping company itself.

The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them there will be found a breach which evinces a deliberate disregard of his bounden obligations. Thus in *Bontex Knitting Works Ltd.* v. *St. John's Garage* (1944) 60 T.L.R. 44, 253, the lorry driver left the lorry unattended for an hour, in breach of an express agreement for immediate delivery. In *Alexander* v. *Railway Executive* [1951] 2 K.B. 882, the cloak-room official allowed an unauthorised person to have access to the goods, in breach of the regulations in that behalf. In *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936, the agent of the finance company delivered a car which would not go at all, in breach of its obligation to deliver one that would go. In each of those cases it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf: and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent, see *Smackman* v. *General Steam Navigation Co.* (1908) 13 Com. Cas. 196; *Ashby* v. *Tolhurst* [1937] 2 K.B. 242 at p. 253 by Sir Wilfrid Greene, M.R., and *Swan Hunter and Wighan Richardson Ltd.* v. *France Fenwick Tyne & Wear Co. Ltd.* [1953] 1 W.L.R. 1026 at pp. 1030–1032.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

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In the Privy Council

SZE HAI TONG BANK LIMITED

v.

RAMBLER CYCLE CO., LIMITED

DELIVERED BY LORD DENNING

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