1961
Dec. 11; 13, 14
1962
Jan. 11,
Oct. 15

THE TUNNEL PORTLAND CEMENT CO. LTD. v. PRINCE LINE LTD. & ANOTHER

[VASSILIADES, J.]

THE TUNNEL PORTLAND CEMENT CO. LTD.,

Plaintiffs,

v.

1. PRINCE LINE LIMITED,
2. LIGHTERAGE & TRANSPORT CO. LTD.

Defendants.

(*Adm. Action No.* 4/60).

Civil Wrongs—Negligence—The doctrine of res ipsa loquitur—Common carriers—Liability tantamount to that of Insurers—Whether or not the doctrine of "common carriers" applicable in Cyprus.

The plaintiffs bought in Cyprus 700 asbestos fibre valued at £2315.— for transport to United Kingdom. They were to be carried to United Kingdom by a ship belonging to the first defendants. The second defendants undertook to load the goods with their lighters at Limassol, on the first defendants' ship. It was alleged by the plaintiffs that, due to the negligence of the servants of the defendants or either of them, the goods were lost in the sea during loading operations at Limassol roadstead. And the plaintiffs claimed damages accordingly. Their claim was put alternatively on contract or on the English doctrine of the "common carriers".

Held : (1) On the facts, I find for both defendants on the issue of negligence.

(2) A sudden blust of wind, a heavier wave, a stronger push of water back from the ship, or any such accident, could have done the loss. And the existence of such conditions is amply established by the evidence.

(3) This is not a case where *res ipsa loqbitur*, as suggested on behalf of the plaintiffs ; or, to use the corresponding common Greek Cypriot expression, where "τὸ πρᾶγμα μιλᾶ μόνο του". Taking the meaning of the maxim in its legal sense in the common law of England, from the quotations in paragraphs 76—79 of Charlesworth, on Negligence, 3rd Edition, at p. 42, I am inclined to the view that the rule is not applicable to the facts of this case.

(4) There was found to be no contract between the plain-

tiffs and the first defendants, for the transport of the goods to the ship.

(5) And likewise, the evidence does not show that these defendants were carrying the goods under a contract with the plaintiffs. None was found.

(6) Interesting as all this may be, the Court could not find, on the pleadings, or on the evidence before it, that the second defendants in this case are "common carriers" in the legal sense of that expression, in the common law of England.

(7) But even if they were the High Court would be very reluctant to hold in Cyprus to-day, that on rules emanating from common usages in England under conditions prevailing there, more than 250 years ago, lightermen in Limassol carrying goods from pier to ship in 1959, owed to the owners of the goods or to their insurers more than a duty to do their work with reasonable care and average skill. To hold them in addition to be insurers of the goods in the absence of any express agreement to that effect; or an implied undertaking resulting from the usage of their trade, would not, in our opinion, be warranted by law.

Plaintiffs' claim dismissed against both defendants with costs for the first defendants. No order for costs regarding second defendants. *

Cases referred to:

Morse v. Slue (*1671*) 83 E.R. 453;

Coggs v. Bernard (*1703*) 92 E.R. 107;

Liver Alkali Co. v. Johnson (*1874*) L.R. Ex. 338;

Consolidated Tea Co. v. Oliver's Wharf (*1910*) 2 K.B. 395;

Paterson Steamships v. Canadian Wheat (*1934*) A. C. 538, p. 544.

Admiralty Action.

Admiralty Action instituted by plaintiffs against the above-named defendants claiming the amount of £2.315.—

*Editor's Note:

The plaintiffs appealed against this judgment. During the hearing of the appeal, the appeal against 1st defendants was abandoned and was dismissed with costs up to the time it was abandoned, whereas the appeal against 2nd defendants was allowed with costs throughout. (*Vide* Civil Appeal No. 4403, decided on 7.5.63).

for value of goods lost in the sea, during a loading operation at Limassol roadstead, due to the negligence of the defendants.

Chr. P. Mitsides for the plaintiffs.

A. Michaelides for the 1st defendants.

M. Houry with Em. Michaelides for the 2nd defendants.

Cur. adv. vult.

VASSILIADES, J. : The claim in this action is for the value of goods lost in the sea during a loading operation at Limassol roadstead, when the barge carrying the goods to the ship, came into collision with the ship's rudder and sank in the vicinity, becoming a total loss of loading-craft and goods.

The goods consisted of 700 bags of asbestos fibre, valued at £2315.— which the plaintiffs, an English company, allege to have bought in Cyprus for transport to the United Kingdom (Petition para. 1). Plaintiffs further allege that the goods were to be carried to their destination by a ship belonging to the first defendants (s/s Black Prince) on which the second defendants undertook to load the goods with their lighters, at Limassol.

The case of the plaintiffs is that the collision was caused by the negligence of the first defendants' servants on the ship; or by the negligence of the second defendants' servants on the lighter ; or both. And that, in any case, the second defendants are liable as carriers at the material time, to compensate the plaintiffs for the loss of the goods.

The first defendants admit that they are the owners of the ship which was to receive the goods at Limassol and carry them to England. But they challenged, and formally denied, plaintiffs' allegations regarding purchase of the goods ; and in any case denied negligence and liability.

In their answer, the first defendants denied specifically the negligence alleged against their servants ; and giving their version of the relevant facts, went on to say that the collission was caused by the negligence of the second defendants' servants in handling their loaded lighter.

The second defendants in their answer, after stating that they do not admit plaintiffs' allegations regarding purchase

and transport of the goods, say that these were lost with their own lighter, after the collision with the first defendants' ship, caused by the negligence of the latter's servants.

By formal admissions filed before trial, both defendants admit the extent of the damage, at £2,315 (value of the lost goods) which was fully paid to the plaintiffs by the underwritters of the insurance covering the goods.

Moreover, by formal preliminary acts, filed in due course, the parties gave their respective versions of the facts which led to the collision. According to the plaintiffs, this was caused by the ship moving suddenly backwards owing to the release of more chain to her anchor, while the lighter in question, was being towed round the stern, on its way from the portside to the starboard side of the ship, during loading. In paragraph 14 of their statement ('A') the plaintiffs say:

> "The fault of the m/v lies in the fact that whilst they requested the lighter to proceed to the other side they moved backwards without calling the attention of the crew of the lighter and/or without paying themselves any attention to the boats passing beneath her stern or back part".

The first defendants, on the other hand, attribute the collision to the releasing of the lighter from the towing tug, which allowed the former to drift "down into the rudder" of the ship while at anchor, and strike heavily thereon. In paragraph 14 of their statement ('B') these defendants say:

> "Barge and/or tug were responsible for the collision, and/or both of them".

The second defendants, in the corresponding paragraph of their statement ('C') 14 (e) attribute the collision to the ship, the navigators of which "Improperly and at improper time attempted to cross the defendants' (2) lighter".

As these statements show, the plaintiffs and the second defendants put their case on more or less the same footing regarding the collision, while the first defendants blamed the second defendants for it.

At the trial the plaintiffs called three witnesses: the seaman in charge of the lighter (P.W. 1), a lighterman working at the material time on another barge operating at the side of the ship (P.W. 2); and one of the four lightermen on the sunk vessel (P.W. 3). Two of the witnesses called by the

plaintiffs were in the employment of the second defendants at the material time. The first defendants called one witness, an officer on their ship, on duty at the time of the collision (D.W. 1).

All the evidence relates to the collision ; and presents no difficulty. Quite fairly and properly, in my opinion, learned counsel for the plaintiffs conceded that the evidence of the ship's officer (D.W. 1) is that of an impartial and reliable witness. I accept it without any hesitation ; and I find accordingly, on the contested facts within his knowledge.

There is no evidence before me regarding the ownership of the goods, or the contracts, express or implied, under which the parties concerned, were acting at the material time. No bill of sale, bill of lading, or other documentary, or oral evidence as to the circumstances under which the goods became the property of the plaintiffs ; or were found on the lighter of the second defendants at the time of the collision.

Be that as it may, however, I must, I think, proceed to make my findings regarding the collision ; and determine thereon the liability of the defendants or either of them, to the plaintiffs as legal owners of the goods, subject to their establishing a good title thereto.

On the evidence before me I find that the second defendants agreed to carry on their lighters, the goods lost, a parcel of a much larger quantity, from Amiandos jetty at Limassol, to the ship of the first defendants, expected to arrive at the roadstead of that port, on the 25th May.

The goods were put on lighters, that morning waiting for the ship to arrive. She dropped anchor at about midday, more than a mile away from the jetty ; and a tug, also belonging to the second defendants, and manned by their servants, left the jetty, towing two loaded lighters towards the ship. The second of these lighters, viz. the last of the vessels in tow, was that which later sank. It was manned by four professional lightermen, at least two of whom the master and witness Hji. Moustafa (P.W. 3) were men with long experience in their trade.

The ship dropped first her port-side anchor, at 12.25 hrs, before the lighters were anywhere near. And at 12.33 hrs, when the ship settled on that anchor, she was brought up to four shackles of chain (360 feet) and finished with her engines.

A S.W. breeze kept the ship in the corresponding direction, with a swing of about 30 degrees. Shore-craft got alongside the ship and stevedores with labourers went on board, as usual. A lighter loaded with boxes, casks, and other goods, where witness Karakas (P.W.2) was working, got alongside in position for hatch No. 2, between midships and bow, on the starboard side, on which the ship was rigged for loading.

To reduce the swing of the ship, and to facilitate loading operations in the choppy sea under the growing breeze, the responsible officer, witness Redman (D.W. 1) had the starboard-anchor also dropped ; this was at 13.18 hrs, just before the first loaded lighter came alongside ; and without the ship moving forward or astern, at all.

The second defendants' tug towing the two lighters loaded with asbestos fibre in bags, approached the ship at about that time, on the port side, when a stevedore, referred to as Panayis Zodhiatis, and his assistant, Christakis, both well known to the lightermen, signalled and called out from the ship that she was not taking cargo on the port side ; and that the lighters should be taken round to starboard. These men were not called ; and the evidence does not connect them with either of the defendants.

As tug and lighters came round the stern with a headway, the last lighter in the tow was disconnected as usual, to let it make its way towards hatch No. 4 between midships and stern, where the lighters were to deliver their load.

Unfortunately, before it reached there the choppy sea and blowing wind carried the lighter towards the ship's rudder, causing a fairly strong collision at 13.25 hrs, which apparently sealed the fate of both lighter and cargo, before any preventive or salvage action could be effectively undertaken. In fact all help seems to have concentrated on the saving of the crew, while the lighter drifted further away and sank with its load.

On these facts, I find for both defendants on the issue of negligence. The plaintiffs and the second defendants have clearly failed to prove the negligence alleged against the first defendants ; and the latter have failed to prove their allegations for negligence against the second defendants.

A sudden blust of wind, a heavier wave, a stronger push of water back from the ship, or any such accident, could have

done it. And the existence of such conditions is amply established by the evidence.

This is not a case where *res ipsa loquitur*, as suggested on behalf of the plaintiffs ; or, to use the corresponding common Greek-Cypriot expression, where "τὸ πρᾶγμα μιλᾶ μόνο του". Taking the meaning of the maxim in its legal sense in the common law of England, from the quotations in paragraphs 76 - 79 of Charlesworth, on Negligence, 3rd Edition, at p. 42, I am inclined to the view that the rule is not applicable to the facts of this case.

Learned counsel on behalf of the plaintiffs in his able address at the closing of the trial, put his clients' case on two footings :—

a) The contract for the carriage of the goods from jetty to ship ; and,

b) negligence on the part of the defendants or either of them.

Having dealt with the issue of negligence, I now have to deal with the contractual claim against the defendants as carriers.

According to the plaintiffs, the contract is to be found in paragraph 2 of the petition which reads as follows :-

> "2. The quantity bought by (plaintiffs) amounting to 4,000 bags of asbestos fibre, was to be carried by s/s 'Black Prince', a ship owned by defendants No. 1, from Limassol to London and for that purpose the Lighterage and Transport Co. Ltd. of Limassol, defendants No. 2, undertook by their lighters to load the said cargo on the said s/s 'Black Prince' anchored in Limassol roadstead at the material time".

It is not stated in this pleading whether the second defendants undertook to carry the goods for the plaintiffs, or, for the first defendants.

In their answer, the first defendants simply "note" the second defendants undertaking ; but make no admission of any contractual relation between them. And the evidence in any case does not connect them. I find no contract between the plaintiffs and the first defendants, for the transport of the goods to the ship.

The second defendants' answer on this point is :—

"2. Save that the defendants were conveying by their lighters the 4,000 bags of asbestos from the pier of the Cyprus Asbestos Mines Ltd., in Limassol, to the s/s 'Black Prince,' the defendants do not admit the other allegations contained in paragraph 2 of the petition".

And likewise, the evidence does not show that these defendants were carrying the goods under a contract with the plaintiffs. I find none.

But even so, I must deal, I think with the contention advanced by learned counsel for the plaintiffs, at the closing of the case, that the second defendants are liable to the owners of the goods, as common carriers who failed to deliver the goods at their destination.

In support of this contention, I was referred to the rules originating in *Morse v. Slue*, decided in 1671 ; and *Coggs v. Bernard*, decided in 1703, as given in Carver's Carriage of Goods by Sea, regarding the liability of public or common carriers. Learned counsel also referred me to *Liver Alkali Co. v. Johnson* (1874) ; and the *Consolidated Tea Co. v. Oliver's Wharf* (1910) 2, K.B., 395:

In this last mentioned case Hamilton, J. is reported at p. 399 to have said :

"The liability of the defendants in respect of this transportation, rests upon the rule which was established after much discussion in *Liver Alkali Co. v. Johnson* (L.R. 9 Ex. 338) and the gist of that decision was that if the defendants were exercising the public employment of carrying goods by water, *which was a question of fact*, then there would be attached to that employment the same liability with regard to the safety of the goods as the law imposes upon common carriers".

And the learned judge on the facts of that case, answered the question of whether the defendants were common carriers, in the negative.

In Carver's 10th Edition, the present position is given at p. 8 - 10 where the above cases are referred to, and where Lord Wright is reported to have said in delivering the judgment of the Privy Council in *Paterson Steamships v. Canadian Wheat* (1934, A.C. 538 at 544) that :—

"At common law (the common carrier) was called an insurer and was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies".

Interesting as all this may be, I would not find, on the pleadings, or on the evidence before me, that the second defendants in this case are "common carriers", in the legal sense of that expression, in the common law of England.

But even if they were, I would be very reluctant to hold in Cyprus to-day, that on rules emanating from common usages in England under conditions prevailing there, more than 250 years ago, lightermen in Limassol carrying goods from pier to ship in 1959, owed to the owners of the goods or to their insurers more than a duty to do their work with reasonable care and average skill. To hold them in addition to be insurers of the goods in the absence of any express agreement to that effect ; or an implied undertaking resulting from the usage of their trade, would not, in my opinion, be warranted by law.

The claim of the plaintiffs must therefore, in my judgment fail regarding both defendants ; and the action be dismissed.

As to costs, in the circumstances of this case, I think that the first defendants are entitled to their costs against the plaintiffs ; and I make order for costs to be taxed accordingly. But as regards the second defendants, considering their pleading against the facts as proved, I think they are not entitled to costs ; and I make no order for costs in their favour.

Action dismissed. Order for costs as above.

Plaintiffs' claim dismissed against both defendants with costs for the first defendants. No order for costs regarding second defendants.