1979 March 27

[A. Loizou, J.]

SARKIS E. SARKIS,

Plaintiff,

v.

1. M/V DEMETRA I, HER OWNERS AND CHARTERERS,
2. APOSTOLOU BROS. SHIPPING AGENCIES LTD.,

Defendants.

(*Admiralty Action No.* 106/78).

Admiralty—Shipping—Senior sailor or boatswain—Whether in law capable to bind the ship and her owners in the absence of express or ostensible authority—Contract of carriage of goods by sea—Freight paid to senior sailor or boatswain—Whether ship and her owners bound to refund the freight in case of breach of said contract.

The plaintiff in this action claimed:

(a) The refund of an amount of U.S. dollars 5,000 paid by him to the defendants and or either of them in consequence of a contract of loading on board the defendants 1, entered into in or about February, 1978;

(b) £690.- expenses arising out of the breach of the above contract by the defendant;

(c) damages arising out of the said breach.

The plaintiff agreed with the owner of the ship for the carrying of 500 cartons of goods of his from Limassol to Syria at a freight of U.S. Dollars 5,000. When this agreement was broken by defendants 2, who loaded on the defendant ship a quantity of goods far in excess of the agreed one, the ship-owner refused to carry same and demanded proportionately higher freight. Upon this happening the plaintiff chose to deal with the senior sailor or boatswain to whom he allegedly paid the agreed freight in cash.

Held, dismissing the claim, that the senior sailor or boatswain in no way could bind the ship or her owner; that he had no express or ostensible authority so as to render the principal liable to perform any obligations imposed on him by his acts, nor his position as a boatswain could be invoked, as in law capable of binding the ship and her owners in the circumstances; and that, accordingly, plaintiffs claim against both defendants must be dismissed with costs (see Scrutton on Charterparties and Bills of Lading, 18th Ed. pp. 37–38).

Action dismissed.

Admiralty Action.

Admiralty action for the refund of 5,000 U.S. dollars paid to defendants in consequence of a contract of loading on board the defendant ship and for the recovery of £690.—expenses arising out of the breach of the above contract.

A. Poetis, for the plaintiff.

G. Mitsides for *L. Papaphilippou*, for defendants 1.

R. Michaelides, for defendants 2.

Cur. adv. vult.

A. Loizou J. read the following judgment. By this action the plaintiff's claim is for:–

" (a) The refund of an amount of U.S. dollars 5,000 paid by him to the defendants and or either of them in consequence of a contract of loading on board the defendants 1, entered into in or about February, 1978;

(b) £690 expenses arising out of the breach of the above contract by the defendant;

(c) damages arising out of the said breach;

(d) legal interest and costs".

It was the case of the plaintiff as set out in the petition that on or about February, 1978, by virtue of an agreement entered into between himself on the one hand, personally and/or by agent and the defendants or either of them and/or the first defendant personally and/or through defendants 2, acting as the agents of the first defendant, the defendants and/or either of them agreed to carry 500 cartons of goods of the plaintiff from Limassol to Syria at a freight of U.S. Dollars 5,000 and

or its equivalent in Cyprus pounds. The plaintiff relying on the aforesaid agreement loaded in fact the agreed cargo on the defendant ship, paying at the same time to the second defendants personally and/or for the account of the first defendants, the sum of U.S. Dollars 5,000 and/or its equivalent in Cyprus pounds. Moreover the plaintiff paid £225, FIOS and £465 as loading and/or discharging expenses and or other fees.

In spite of the said agreement the defendant ship did not sail, and the plaintiff was compelled in order to avoid further damage to load them on board the ship "FABIO" paying U.S. Dollars 7,000 and/or their equivalent in Cyprus pounds.

The alleged damage suffered, in addition to the £690.–, amounts to U.S. Dollars 2,000 or the equivalent in Cyprus pounds being the difference between the agreed freight and the freight paid to the ship "FABIO". Alternatively and without prejudice to the previous claim the plaintiff by the conduct of the second defendants was damaged to the extent of the aforesaid sum.

The owners of the defendant ship and the second defendants filed separate defences. As stated in paragraph 3 of the answer of the first defendant, on or about the 23rd February, 1978, Mr. Karahalios, the director of the ship owners agreed with the second defendants to carry 500 cartons of cigarettes off the coast of Lebanon for the sum of U.S. Dollars 5,000 on condition that a bill of lading or charter–party (navlosymphono) be signed, and the freight be paid in advance. Whilst waiting for the signing of the charter–party the second defendant on the 23rd or 24th February, 1978, loaded on the defendant ship, goods far in excess of the agreed 500 cartons and the ship–owners, by a cable dated 24th February, 1978, asked to be paid the proportionate freight which was U.S. Dollars 10,000. The second defendants protested and said therein that the refusal to accept the agreed cheque for the freight was a breach and that the vessel should proceed as agreed. The owners answered by cable of the 25th February, 1978, denying the contents of that telegram and alleging a breach on behalf of the second defendants, as the cargo loaded was far in excess of the 500 cartons of cigarettes, and that an extra U.S. Dollars 10,000 should have been paid, and failing that they would not sail, and were holding them and the cargo liable.

By their answer the second defendants denied the claim of the plaintiff against them and alleged that the true facts were as set out in their answer which are briefly these:

They were appointed by the master of the vessel to be her agents and do the clearing. A few days later, Mr. Karahalios who appeared to be the main shareholder in the vessel, asked them either to secure the charter of the vessel or obtain a voyage charter, or find cargo or freight for it. In the meantime the master of the vessel Zevros was replaced by another master, a certain Costas, and that Karahalios advised them to deal further with him. Karahalios then left Cyprus. They then succeeded to find cargo for shipment and the deal was concluded with the master. The agreement (paragraph 8 of the answer) was to the effect that the vessel "for the sum of U.S. Dollars 5,000 were to accept certain cargo of the plaintiff". Then Karahalios returned to Cyprus and "he accepted the agreement and/or accepted the cargo. Upon completion of the shipment of the cargo the said Karahalios was not willing to comply with the agreement but wanted more freight". (Paragraph 9 of the answer).

It is alleged that the plaintiff handed over to them the amount of the freight of U.S. Dollars 5,000, but when they informed the plaintiff about the stand of Karahalios, the plaintiff advised them to protest and if need be call the master and offer to him the freight and demand from him full compliance with the agreement, which the second defendant did and finally the master accepted to comply with the agreement upon which they handed to the master the sum of U.S. Dollars 5,000. The master attempted to sail the vessel, but due to some trouble the vessel remained in the port. The vessel was repaired and in fact was ready to sail and guards were placed by the plaintiff on the vessel to protect the cargo. It was also alleged that the master as well as the crew abandoned the vessel for non-payment of their wages, and the vessel remained without any control.

The plaintiff in support of his claim called as a witness Ali Ramade (P.W. 1) the Managing Director of Aswan Shipping Agencies of Larnaca. The plaintiff, however, did not give evidence as he was not in Cyprus at the time, and I must say that his absence leaves to a certain extent a gap that eventually worked to his detriment and which had to be filled in from the evi-

dence adduced on the part of the defendants and the documents produced.

The defendant ship, owned by the Lace Company Ltd., a Cyprus registered company, of which Antonios Karahalios is the main shareholder and director, and for all intents and purposes has been known and referred to as the owner of the ship, arrived in Cyprus on the 29th January, 1978. The second defendants were appointed by her then master Nicolaos Zevros to act for him in connection with matters relating to the clearance of the said ship under the Customs and Excise Laws 1967–1977, and under the authority of regulation 3 of the Ship's Report Importation and Exportation by Sea, Regulation 1967 as shown on *exhibits* 13 and 13(a).

Antonios Karahalios arrived in Cyprus on the 4th February, 1978 and left on the 7th February together with the aforesaid master who never returned again. Karahalios returned to Cyprus on the 23rd February and left on the 28th February, in order to return again on the 5th March and stayed here until the 7th April.

Whilst in Cyprus at the first period, he and Vassos Apostolou visited the office of Aswan Shipping Company Ltd., in Larnaca and met Mr. Ali Ramadi its managing director and discussed with him the prospects of securing a cargo for the defendant ship which was anchored idle in Limassol. Eventually an agreement was concluded for the carriage by the said ship of 500 cartons of cigarettes from Limassol to Syria at the agreed freight of U.S. dollars 5,000 or the equivalent in Cyprus pounds. Although in evidence, both Ramadi and Vassos Apostolou the director of the second defendants stated that the agreement was in respect of an unspecified quantity of cargo to be carried at a freight of U.S. dollars 5,000, yet I am not prepared to accept their version and act contrary to the other evidence and to the allegation contained in paragraph 2 of the petition, in which it is clearly alleged that the agreement was for the carriage of 500 cartons of goods.

The defendant ship on account of some mechanical trouble could not berth on the 23rd February, but did so on the 24th, and the loading started whilst Mr. Karahalios was on board the defendant ship. Constantinos Tzimos, a senior sailor on the

said ship, (boatswain) was making a note of the number of cartons loaded which came to be in all 1,750. He informed about it Karahalios, who asked for explanations from Mr. Vassos Apostolou. The latter told Karahalios that the difference of freight, being U.S. dollars 10,000 would be paid. A cheque drawn on an external account for U.S. dollars 5,000 by Kendal's Traders, Ltd., self was not accepted by Karahalios. There followed an exchange of cables and protestations, the contents of which show the different versions on the subject and eventually Karahalios, Apostolou, Stavros Monoyios the engineer of the defendant ship, and Mr. Peratikos, met at the office of Mr. Koukoumis, one of the port pilots at Limassol port.

Mr. Apostolou said that he would get in touch with the plaintiff to pay U.S. dollars 7,500 but Karahalios did not accept this offer. Vassos Apostolou stated in evidence that he then called Costas Tzimos, whom he described as "captain Costas" to his house and asked him to honour the agreement they had concluded together for the carriage of the plaintiff's goods at U.S. dollars 5,000. It was alleged that before Karahalios left Cyprus he had indicated the said Costas as his representative, with whom Apostolou could deal regarding the carriage of goods by the defendant ship. The said Costas agreed to honour their agreement and asked Apostolou to give the cheque to the plaintiff and pay him in cash and that he would sail the ship with the cargo on to their destination.

Apostolou further stated that on the 25th February at about 9.00 a.m. he visited the plaintiff at the KENNEDY Hotel, Nicosia, returned the cheque, received the equivalent on U.S. dollars 5,000 in Cyprus pounds and together with the two men of the plaintiff, who were later placed on board the defendant ship as guards, returned to Limassol where he found Costas Tzimos and gave him the money in the presence of a certain Ali Hamdi, a certain Mr. Arabadjis, the engineer and in the presence of another engineer known as Spyros. He made this payment on instructions from the plaintiff.

On the following day the plaintiff together with Costas Tzimos went to the house of Apostolou and told him that the contacts of an anchor had been burnt and the defendant ship could not sail and asked him to arrange for their repair, which he did. On

that occasion he mentioned to the plaintiff that he had paid the U.S. dollars 5,000 to Costas who agreed that he had received them and said that he had them in the safe of the ship.

On the 27th February, 1978, the second defendants wrote to the Senior Collector of Customs and Harbour Master of Limassol a letter (*exhibit* 4), by which they drew their attention that they loaded on the defendant vessel a cargo of about 1,750 cartons and went on to say:

" The freight agreed prepaid U.S.$5000.00.

Freight collected by me and handed to the captain of the said vessel on behalf of the owner. Master refusing to sign B/L up to now.

Buyers do not accept the ship to sail as we have from reliable sources that will take the cargo and run away. We request you as agents of the above vessel to discharge the cargo. The freight which has been paid to the captain of the above vessel to be refunded back and buyer willing to pay any expenses incurred of ship such as Port customs Overtime dues etc.

We kindly request you to intervene to solve this matter and your decision will be accepted by us."

This letter was countersigned by the plaintiff and a certain Ali Hamdi, the person in whose presence Apostolou alleged to have given the money to Costas Tzimos.

This is a serious admission on the part of the plaintiff as to the payment of the freight to the so called "captain of the ship". We know that the defendant vessel had no master at the time as her master Nicolaos Zevros had left Cyprus as from the 7th February. Costas Tzimos was only the senior sailor or boatswain; in fact the senior member of the crew on board at the time was her engineer. The significance, however, of this letter becomes evident when it is read in conjunction with the evidence of Vassos Apostolou to the effect that the money was paid to the said Costas Tzimos on instructions from the plaintiff and in fact in rather suspicious circumstances because the payment was made in cash after the owner of the ship had refused to go through with a contract different than the one he had agreed and rejected the cheque for U.S. dollars

5,000 offered to him as freight. One cannot help wondering as to why Costas Tzimos had to be approached and paid in cash when the cheque issued to self with a mere indorsement would serve the purpose.

I have no difficulty in concluding that the sole purpose for such payment was to secure a voyage without the agreement and in fact behind the back of her owner, who on the evidence as accepted by me did not appoint Costas Tzimos as his representative.

I need not therefore refer to the rest of the evidence, conflicting as it is, except to say that the plaintiff was seen driving around his Mercedes car with Costas Tzimos in it which points to the direction of plaintiff relating with him and of his determination to secure by all means the voyage in question, hence also the fact of giving to him the necessary codes for effecting contact upon arrival with the consignees of the cargo in question.

I have no difficulty in holding that Costas Tzimos in no way could bind the ship or her owner. He had no express or ostensible authority so as to render the principal liable to perform any obligations imposed on him by his acts, nor his position as a boatswain could be invoked, as in law capable of binding the ship and her owners in the circumstances.

As stated in *Scrutton on Charterparties and Bills of Lading*, 18th Ed. pp. 37–38:

> " The ordinary authority of a master has lessened very much in modern times. Modern methods of communication have enabled the owner to perform much of the master's work in foreign ports. ...increased facilities of communication have much diminished the cases where, not being able to communicate with his owners, such necessity arises. The cases must therefore be read subject to the proviso that the position of the master has materially altered of late years; the master has been superseded partly by the owner and partly by the broker and the broker's or master's authority is usually strictly defined by the printed bill of lading.

Thus, in the absence of express authority, the master has no authority –

(1) to charter the ship;

(2) to vary the contract of affreightment;

(3) to issue bills of lading differing from the charter;

(4) to sign bills of lading for goods not shipped;

(5) to sign a second bill of lading for goods for which a bill has already been signed;

(6) to agree to carry goods freight free or to agree that freight shall be paid to a person other than the owners;

(7) to certify the quality, as distinct from the condition, of goods shipped;

(8) to settle claims for freight or demurrage."

In the present case we have the owner of the ship being present at all material times and giving no authority to anyone from his crew including the so called captain, to conclude any agreement for the carriage of goods on board the defendant ship. On the contrary the agreement concluded with him was broken by the shipper who loaded on the defendant ship a quantity far in excess of the agreed one. Justifiably, the ship-owner refused to carry same and demanded proportionately higher freight. Upon this happening the plaintiff chose to deal with Costas Tzimos, a person having no authority in the circumstances, either in fact or in Law, or by virtue of his rank as a member of the crew.

For all the above reasons the plaintiff's claim is dismissed against both defendants with costs to be assessed by the Registrar.

Plaintiff's claim dismissed with costs.