PRIVY COUNCIL.

P. C.* 1926

July 26.

HOGARTH AND OTHERS (PLAINTIFFS)

v.

CORY BROTHERS & Co., LTD., (DEFENDANTS) (AND CONNECTED APPEAL).*

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Ship—Charter-party—Delay in obtaining berth—Charterer's failure to have cargo ready—Rule of port—Government Regulation—Demurrage

A steamship was chartered to load a full cargo of coal at Calcutta. The charter-party provided, *inter alia*, that the lay days were not to count until the ship was in berth, also that its provisions were subject to Government regulations and restrictions affecting the usual shipment of the cargo. Notice of readiness was given on December 27, but the ship did not obtain a berth until February 13; the loading then began but was not completed until several days after the expiration of the lay days owing to the absence of cargo. It was a rule of the port that a ship could not have a berth assigned to her until coal was actually ready on the wharf or about immediately to come down It appeared from the evidence that the ship had not obtained a berth earlier because no coal was ready; coal had been sent down labelled for the ship, but as the ship was not in a berth it had been diverted to other ships which were being loaded by the charterers' agents, who were also agents for the owner.

Held, that the rule of the port under which the obtaining of a berth had been delayed was not a Government regulation or restriction within the exceptions in the charter-party, and that as the delay was due to the act or default of the charterers in not having the coal ready they were liable for damages in respect of the time so lost; further that they were liable for demurrage, having failed to establish either of their defences, namely (*i*) that the delay in loading was due to a shortage of wagons,

* *Present*: VISCOUNT HALDANE, VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE AND LORD CARSON.

for which the charter-party provided they were not to be responsible, or (*ii*) that there had been an accord and satisfaction as to their liability.

Ashcroft v. *Crow Orchard Colliery Co.*, (1874) L. R. 9 Q. B. 540, as explained by Lord Blackburn in *Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599, 622 approved and followed.

Judgment of the Appellate Court varied.

CONSOLIDATED Appeals (Nos. 93 and 94 of 1925) from two decrees of the High Court in its Appellate Jurisdiction (January 2, 1923) varying a decree of that Court in its original jurisdiction.

The suit arose out of a charter party by which the abovenamed appellants as owners chartered to the respondent Company the SS. "Baron Ardrossan" to load at Calcutta a full and complete cargo of coal for carriage to Colombo. The owners sued the charterers in the High Court claiming (*i*) damages for the detention of the ship at Calcutta pending a loading berth being assigned to her, and (*ii*) demurrage under the charter-party for delay in loading beyond the lay days provided. The trial Judge (Buckland J.) held that the charterers were not responsible for the delay in obtaining a berth, and that in any case they were excused by an exception in the charter-party with regard to Government regulations and restrictions. He held, however, that the charterers were liable for Rs. 44,416-10-8 for demurrage, and that as to that liability (for which he made a decree) there had not been, as was contended, an accord and satisfaction.

Both parties appealed. The Appellate Court (Greaves and Chakravarti JJ.) held that the charterers were responsible for the delay in obtaining a berth, and remitted the suit to assess the damages; with regard to the demurrage, it was held that though the charterers became liable there had been an accord and satisfaction.

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The facts, including the material terms of the charter-party, appear from the judgment of the Judicial Committee.

Le Quesne, K. C., and *Sir Robert Aske*, for the owners (plaintiffs).

Miller, K. C., Birkett K. C., and *Pritt*, for the charterers (defendants).

[Reference was made to *Tapscott* v. *Balfour* (1), *Ashcroft* v. *Crow Orchard Colliery Co.* (2), *Postlethwaite* v. *Freeland* (3), *Watson* v. *H. Borner & Co.* (4), *Peneiro & Co.* v. *Dupré* (5), *Harrowing* v. *Dupré* (6), *Ardan Steamship Co.* v. *Weir & Co.* (7), *Brightman & Co.* v. *Bunge Y. Born Co.* (8) *Owners of "Panaghis Vergottis"* v. *Wm. Cory & Co.* (9), *United States Shipping Board* v. *Strick & Co.* (10); also (on authority of captain to give discharge for demurrage) *Holman* v. *Peruvian Nitrate Co.* (11).

The judgment of their Lordships was delivered by LORD PHILLIMORE. In this action both plaintiffs and defendants are appealing from the decree of the High Court of Judicature at Calcutta.

The appeal of the plaintiffs was preferred before that of the defendants, and the latter is therefore treated as a cross-appeal; but historically the subject of the defendants' appeal comes first and will be taken first in this judgment.

The plaintiffs are owners of the Steamship "Baron Ardrossan," and they on the 31st July, 1920, entered

(1) (1872) L. R. 8 C. P. 46.
(2) (1874) L. R. 9 Q. B. 540.
(3) (1880) 5 App. Cas 599.
(4) (1899) 4 Com. Cas. 335; (1900) 5 Com. Cas. 379.
(5) (1902) 7 Com. Cas. 105.
(6) (1902) 7 Com. Cas. 157.
(7) [1905] A. C. 501.
(8) [1924] 2 K. B. 619.
(9) (1926) 25 Lloyd's List 61.
(10) (1926) H. of Lds. (unreported).
(11) (1878) 4 Rettie 657.

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into a charter-party with Messrs. Graham & Co., of London, acting as agents for the defendants. By this charter-party this steamship was to receive on board at Calcutta, "at such dock, place or wharf as char-"terers may direct, lying always afloat, from the said "charterers or their order, a full and complete cargo "of coal in bulk, which cargo the said charterers "bind themselves to ship, or cause to be shipped," and to proceed with all possible despatch to Colombo, where she was to deliver the cargo.

The charter-party contained many of the usual provisions and exceptions which need not be here specified. The important ones for the purpose of this case are clauses Nos. 3, 11, 12, 13, 22, 24, 25, which are as follows:—

3. In the event of war, or disturbances, or strikes, lock-outs, or stoppage of labour, from whatever cause, or pestilence, or epidemical sickness, or earthquakes, fires, storms or floods, or the failure on the part of the railways to supply wagons, or detention by railways, or other hindrances beyond the control of suppliers affecting the working of this contract, suppliers shall not be bound to deliver nor shall they be held responsible for their inability to do so, and such time not to count as lay days. The steamer, however, reserves the right to sail from loading port with what she has on board; if, from causes other than the weather, she is delayed more than 24 hours, no claim resulting against charterers for dead freight.

11. The cargo to be shipped at Calcutta and discharged at port of destination within 18 weather working days (Sundays and holidays excepted); such lay-days at loading port are to count after expiry of usual 24 hours' notice from Master or Agents of steamer's readiness, steamer having been duly entered at the Custom House, but not until steamer is in berth and not before the 1st December unless with the charterers' consent and steamer ready. The usual 24 hours' notice to be given by the Master at the port of discharge. Holidays which the Chambers of Commerce at Calcutta and port of discharge declare to be working days to count as lay-days.

12. The charterers to have the option of cancelling this charter if the steamer be not ready to load at Calcutta on or before the 25th December

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13. Demurrage, if any, at the rate of Rs. 2,000 per running day, and *pro rata* for part of a day, payable day by day in cash as incurred.

22. Steamer to be consigned in Calcutta to Messrs. Graham & Co.

24. Steamer to be consigned at port of discharge to charterers' Agents paying them the usual fee for attending the steamer's business.

25. Subject to Indian Government license for export of coal being obtained, if necessary, and the cargo being released and coals available, and in all respects to customs and other Government regulations, restrictions, or otherwise, affecting the normal shipment of the cargo and clearances and sailing of the vessel.

The charterers made arrangements for the supply of the coal through Messrs. Graham & Co., who in turn arranged for the coal to be supplied and shipped by the firm of Kilburn & Co., who again were managing for the Tata Iron and Steel Co., Ltd.

The ship arrived in port on the 27th December, 1920, and the master forthwith gave notice to Messrs. Graham & Co. that he was ready to load; and his notice was accepted as from 10 o'clock of the following day. But she did not enter her berth till the 13th February, 1921.

Coal was then begun to be loaded upon her, but there were from time to time delays in the process of loading; and twice over from the 20th February to the 25th February and from the 27th February to the 9th March, she was removed by the port authorities from her berth out into the docks, because there was no cargo for her She eventually left Calcutta on the 22nd March, and arrived at Colombo on the 30th. She began her discharge on that day and completed it at 3.15 on the 4th April. The time lost between the 13th February and final discharge has been agreed between the parties as 22 days and 5 hours, the demurrage for which would amount to Rs. 44,416-10-8.

The plaintiffs assert that this sum is payable in any event, but they also claim Rs. 94,000 as damages for detention at the same rate as that fixed for demurrage

from the 29th December to the 13th February, on the ground that it was by the act or default of the defendants, and their agents that the ship did not reach her berth as soon as she had entered the Kidderpore dock.

The defendants denied their liability for both claims and further said that in respect of the claim for demurrage proper, there had been an accord and satisfaction, the plaintiffs having accepted the sum of Rs. 2,076-3-9 in full discharge of their claim for demurrage.

The case was tried in the High Court by Buckland J., who after hearing oral evidence and receiving many documents which were put in at the trial, decided against the plaintiffs' claim for damages for detention up to the 13th February, but in favour of the plaintiffs' claim for demurrage proper; while he further rejected the defence of accord and satisfaction. He gave judgment therefore for the sum of Rs. 44,416-10-8 with interest and costs.

Both parties appealed, and the case was heard in the appellate civil jurisdiction by Greaves J. and Chakravarty J., who gave judgment on the 2nd January, 1925.

By this judgment the claim of the plaintiffs for detention was allowed, but the amount of the damages was left for further determination. The claim of the plaintiffs for demurrage proper was accepted as good in itself, but the defence of accord and satisfaction was maintained, and therefore the decree for this sum was reversed, and certain consequential provisions were made about the costs. From this decree as has been said, both parties have appealed.

The defendants put their case in this way. They say that it was not their duty to find a berth for the steamship, and that their duty to load coal only began when the ship was berthed. They deny that they

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had failed to provide cargo; they deny that there was any delay in fact in the steamship getting a berth; and they say that if there was any such delay, it was due to causes beyond their control. With regard to the interruptions and delay during the loading they relied on failure of the railway company to supply wagons and upon the restrictions imposed by Government upon loading. Generally, they claimed the benefit of the exceptions to the charter party.

Graham & Co. procured a proper license for the exportation of coal, and they indented upon the railway company for wagons, and eventually, but not till the 13th January, they opened what is called "a station" for the steamship—that is, they procured a place upon the wharf to which coal could be sent for loading—and Kilburn & Co. began to send down coal labelled for the "Baron Ardrossan". But as the "Baron Ardrossan" was not at a berth, coal so labelled was put instead upon other steamships which were also taking coal from Kilburn & Co., through Graham & Co.; and Kilburn & Co. got the indenture of the wagons transferred from the "Baron Ardrossan" to other ships.

The rule of the port was that a vessel could not have a berth assigned to her until there was either coal actually ready for her on the wharf or about immediately to come down in sufficient quantities to make the loading continuous.

As a matter of fact, when the "Baron Ardrossan" did get a berth and had began to load, she was twice removed from her berth because there was no coal ready to put on board her.

Under the terms of the charter-party, lay-days were not to count until the steamer was in berth, and as she was not in her birth till the 13th February, lay-days in the strict sense of the term did not begin to

run till then. But the plaintiffs alleged that the delay in getting to her berth was due to the fact that the charterers were not ready to load, and that, not being ready, they did not take proper steps to procure a berth.

If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or owing to the default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place, and that the charterer must pay for the subsequent delay. Whether the latter's measure of liability is arrived at by giving to the shipowner damages for the delay, or whether the lay-days are antedated to the date when they ought to have begun, and the charterer pays for them at the agreed rate of demurrage, does not seem to have been determined. But no point as to which of these two measures of payment should prevail, has been made by the parties in this case. The plaintiffs appear to have put their claim as for lay-days; but the Appellate Court, which has decided in their favour, has treated the question as one of damages which are to be assessed if no agreement is come to, and this decision has been accepted by the plaintiffs.

Their Lordships have, therefore, to decide whether the delay in getting to a loading berth was, or was not, due to the act or default of the charterer. The Judge of first instance thought that it was not so due. He thought that a berth was not available, and that it was the congestion of shipping which prevented the vessel from getting to a berth. He found "that "so far as the period anterior to the 14th February "is concerned, the delay in loading the cargo was "due to 'Baron Ardrossan' not obtaining a berth by "reason of causes for which the charterers cannot

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"be held responsible." He added: "If it is requisite "to invoke an exception of the charter-party, "should be prepared to hold that the charterers "are protected by clause 25."

As to this application of clause 25 in the charter-party, their Lordships cannot agree with Buckland J. The words "Government regulations and restrictions" do not include local regulations made by the port authorities and affecting the time or manner of loading in the port. If the charterers are to succeed in this case, it will be because the delay in getting a berth was occasioned by causes for which they were not responsible.

Dealing, then, with this question, their lordships are of opinion that the view of the facts which was taken by the Appellate Court is sounder than the view taken by Buckland J. As Greaves J. says: "If a "cargo of coal had been ready for the 'Baron "Ardrossan' on the 29th December or a day or two "later, a berth would have been found for her not-"withstanding the condition of the port." This view is supported by the evidence, and he was right, therefore, in holding "that the steamer was prevented "entering a berth by the fact that no cargo was ready "for her."

As Chakravarti J. says, the reason why the steamer did not get a berth was "that there was no "coal available for her at the docks to load, and "unless there was such coal ready for the ship or "there was immediate prospect of her getting coal "there, the Commissioners of the Port of Calcutta "did not allow a ship to enter a coal berth, although "there was no objection to her going inside the "docks and to moor at the buoys there, if vacant".

The truth of the matter is that Kilburn & Co. had arranged to supply coal to many more steamships

than there was room for at the coaling berths: that Grätham & Co. left the matter to be arranged by Kilburn & Co., and that Kilburn & Co. thought that they had done all that was necessary if they arranged to take these steamships in the order of their arrival at the port.

Coal was actually despatched and labelled for the "Baron Ardrossan" and was then put on board some of the earlier steamships because the "Baron Ardrossan" was not in a berth. Equally when the "Baron "Ardrossan" got into a berth, coal destined and labelled for other steamships was put on board her.

But as the Appellate Court rightly finds upon the evidence, if the port authorities had been informed that there was coal ready for the "Baron Ardrossan," she would have got a berth and would have been loaded in time. To quote again the judgment of Chakravarti J.—

"The port authorities did not mind, which steamer out of a number "of steamers belonging to the same agents, was loaded first. Their order "of loading was entirely under the control of the agents and the dock "authorities were quite indifferent in this matter. The plea that the delay "was due to congestion at the coal berths therefore fails. It seems to me "therefore that the defendants have failed to bring their case within the "provisions of either clause 3 or 25."

The facts being as the Appellate Court correctly found them, the case comes within the principle to be extracted from the decision in *Ashcroft* v. *Crow Orchard Colliery Co.* (1) as explained by Lord Blackburn in *Postlethwaite* v. *Freeland* (2).

The vessel was at the disposal of the charterers, and it was their own act which caused the delay.

It is idle to say that it was the duty of the ships' agents, who it may be observed in passing were also the agents of the charterers, to approach the dock

(1) (1874) L. R. 9 Q. B. 541. (2) (1880) 5 App. Cas. 599, 622.

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authorities and get the allotment of the berth. They could not do it in one capacity because they were not providing the cargo in the other capacity. On this part of the case the decision of the High Court must stand.

During the course of the argument, their Lordships were referred to two recent cases not yet reported, *United States Shipping Board* v. *Strick & Co.* (1) (House of Lords), and *Owners of Panaghis Vergottis* v. *Wm. Cory & Co.* (2) (before Greer J.).

The first case turned on the consideration of a charter-party, different in form to the present and is therefore of no assistance. The second case is not altogether unlike the present, and Greer J., while holding that it was not the charterers' duty to have a full cargo waiting on the quay side to be shipped, held that it was his duty to have a reasonable portion of the cargo ready and to be in a position to supply the rest as it was required, and that if by reason of his not having a reasonable portion ready, the dock authorities would not allow the ship to come to the berth, the charterer was liable to pay damages for the detention of the vessel.

The second matter of appeal concerns the claim for demurrage after the vessel had got into her berth. The excuse for this detention was the shortage of wagons, which is an exception provided for in clause 3 of the charter-party. As to this it is said that there are concurrent findings of fact by both Courts, and if so the rule of the Board is that such concurrent findings are not to be disturbed. There are conceivable exceptions to this rule, but they do not apply in the present case. It was sought to be shown by

(1) Unreported. (2) (1923) 25 Lloyd's List 64.

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documents that there was, taking the port and railway generally, from time to time, some shortage; and this was apparently so, but the connection of such shortage as there was, with the delay in loading this particular ship, or any part of the delay in loading her, was not established. It was found by the Judge of first instance that charterers had but to indent for a sufficient number of wagons, and they would have obtained the number required to bring down the coal to the extent to which it was required for the purpose of loading. The Judges in the Appellate Court accept this view. Their Lordships cannot re-open this part of the case.

But it is contended for the defendants that there was an accord and satisfaction of this claim for demurrage, the sum of Rs. 2,076-3-9 having been received by the plaintiffs at Colombo in full discharge of this claim.

On this point Buckland J. decided in favour of the plaintiffs, and rejected the plea. But the Appellate Court took a different view, and decided this part of the case against the plaintiffs, and it is from this part of the decree that the original appeal was brought, those matters which their Lordships have already decided forming the subject matter of the cross-appeal.

Upon this matter their Lordships are in accord with the judgment of Buckland J. The facts relied on appear, as Greaves J. observes, from a few documents. There is no oral evidence that bears on the question. It is difficult to extract from these documents any suggestion of an intention to give up such a large claim. What would appear is that there was no question about the liability of the charterers to the extent of the sum actually paid, and, therefore, this sum was taken at once, leaving the question of any

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further amount for subsequent arrangement. Except that they got immediate payment which they could always have insisted on by reason of their lien on the cargo, the supposed settlement gave the shipowners nothing. Their Lordships were for the moment impressed by the fact that the cargo was released without full payment being exacted, but it was pointed out that there was no cesser clause in the charter party, and that the solvency of the defendants, Messrs. Cory Bros. & Co. Ltd., was unquestionable. The burden being on the defendants to prove the accord, they fall short of so doing.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that the judgment of Buckland J. ordering the defendant Company to pay Rs. 44,416-10-8 with interest, should be restored, and that the cross-appeal should be dismissed and that the plaintiffs do have their costs of this appeal and cross-appeal and in both Courts below.

Solicitors for owners: *Botterell & Roche*.

Solicitors for charterers: *Ince, Colt, Ince & Roscoe*.