APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

THE BRITISH INDIA STEAM NAVIGATION COMPANY (DEFENDANTS), APPELLANTS,

1895. September 5, 17, 25.

v.

IBRAHIM SULAIMAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Bill of lading—Cargo unclaimed on arrival of ship—Rights of shipowner to land goods—Damages by rain—Harbour Trust Act (Madras)—Act II of 1886.

The defendants' steam ship arrived at Madras on 4th December 1891, bringing bags of grain consigned to the plaintiffs who on that date were not authorised to receive them. The plaintiffs set up a custom that cargo of this description ought to be landed on the beach; but, as this could not be done in the absence of the consignees, the defendants landed it the same day on the pier and delivered it into the custody of the Madras Harbour Trust for storage pending delivery to the consignees. On the 8th of December 1891, heavy rain fell, and on the same date plaintiffs learnt that the cargo had been delivered on the pier. When the plaintiffs came to take delivery on that day, a considerable portion had been damaged by rain for which they now sued the defendants:

Held, (1) that where the consignees were unable to take delivery in the ordinary way on the beach, the master of a ship has the option of landing and ware-housing the goods, and that delivery to the Harbour Trust for custody was not wrongful;

(2) that in the absence of proof that the defendants were negligent, or that they failed to deliver the goods, the suit must be dismissed.

APPEAL under section 15 of the Letters Patent against the decision of *Muttusami Ayyar*, J., under section 617, Civil Procedure Code, upon a case stated by the Chief Judge of the Presidency Small Cause Court under section 69 of Act XV of 1882.

The facts appear sufficiently from the letter of reference which was as follows:—

"The plaintiffs claim Rs. 709-3-11 as damages sustained by them between the 4th and 8th December 1891 in respect of 248 bags of grain, part of a shipment of grain per S.S. *Fultalah*, consigned to plaintiffs at Madras, and which the defendants were employed by the plaintiffs to land, and which, owing to the defendants' neglect and default by allowing them to be exposed to rain, became damaged.

* Letters Patent Appeal No. 42 of 1894.

THE BRITISH INDIA STEAM NAVIGATION COMPANY v. IBRAHIM SULAIMAN.

The defendants deny the employment to land as alleged, or that they did land, that the damage, if any, was caused by plaintiffs' own conduct, that the damages claimed are excessive and plead that they are not indebted.

The facts of the case are that plaintiffs were the consignees of a cargo of grain from Calcutta per S.S. *Fultalah*, a ship belonging to the defendants' company, which arrived at the port of Madras on the 4th December 1891, that, prior to the arrival of the steamer, Messrs. Binny and Company, the agents of the defendants' company here, directed Messrs. P. Ramanjulu Naidu and Sons to be in readiness to land the cargo from the *Fultalah*, and that on the arrival of the *Fultalah* the said Messrs. P. Ramanjulu Naidu and Sons, acting under such directions, landed the *Fultalah's* cargo including that portion of it which included plaintiffs' consignment, and that this landing of cargo by Messrs. P. Ramanjulu Naidu and Sons was according to the custom of the defendants at this port, and that it was acquiesced in by the plaintiffs. Landing of "coast or bag cargo," the evidence establishes according to the custom of the port of Madras, is effected by landing it on the beach, but in this case a portion of the cargo of the *Fultalah* including the bags as to which plaintiffs claim damages were, for the convenience of the ship, landed at the pier—a proceeding which entails extra expense, &c. This landing on the pier of portion of plaintiffs' cargo was on the 4th December 1891.

On the 4th December plaintiffs had no authority to receive their consignment, and Messrs. P. Ramanjulu Naidu and Sons had no authority to deliver to them any goods. The authority to deliver plaintiffs' consignment to them was signed by Messrs. Binny and Company on the 7th December and is marked No. 4.

I find on the evidence that the first intimation given to plaintiffs that part of their consignment had been landed on the pier was on the 8th December, and that rain fell on the morning of the 8th December between 3 and 4 A.M., and that when plaintiffs' people first saw their bags, some of them had been damaged by rain.

It is a further fact that no delivery of any of the bags landed on the pier was taken by plaintiffs till 11th December, and it is proved that rain fell on and off for a week from 8th December. There is no evidence to show the specific damage suffered up to 8th December, nor of its increase up to the 11th December.

On these facts I have given a judgment for the plaintiffs for Rs. 100 damages holding that the landing was the act of the defendants, and that the landing of a portion of plaintiffs' consignment on the pier was an unusual and unauthorized act, and damage was in consequence caused.

The defendants, however, contend that, under clause 1 of the Bill of Lading No. 1, they had the right to land the cargo, and that the contract for delivery was completed by the discharge from the ship into the boats of their agent. Landing during the argument was admitted by defendants' professional advisers to include delivery. The defendants' attorney having required me to state a case for the opinion of the High Court, I beg to submit the following question:—

"Whether, upon the facts as stated and found by me and "above recited, my judgment deciding that plaintiffs are entitled "to Rs. 100 damages by reason of the defendants' conduct in the "landing and delivery of a portion of plaintiffs' consignment is "correct."

The material portion of the bill of lading was as follows:—

"The company to have the option of delivering these goods "into receiving ship or landing them at consignee's risk and "expense, as per scale of charges to be seen at the agents' offices, "the company having a lien on all or any part of the goods, "against expenses incurred on the whole shipment. The com-"pany's liability shall cease as soon as the packages are free of the "ship's tackle, after which they shall not be responsible for any "loss or damage however caused."

Branson & Branson for plaintiffs.

Mr. *K. Brown* for the defendants.

MUTTUSAMI AYYAR, J.—This is a case stated for the opinion of this Court by the learned Chief Judge of the Court of Small Causes at Madras. The plaintiffs are the consignees of a cargo of grain shipped from Calcutta to Madras per S.S. *Fultalah*, which belongs to the defendants' British India Steam Navigation Company, Limited. The ship arrived at the port of Madras on the 4th December 1891, and prior to its arrival Messrs. Binny and Company, defendants' agents at Madras, had directed Ramanjulu and Company to land the cargo. Accordingly Ramanjulu and Company landed the cargo. So far as the landing was concerned, it is found to be in accordance with the custom of the port and to have been

THE BRITISH INDIA STEAM NAVIGATION COMPANY v. IBRAHIM SULAIMAN.

acquiesced in by the plaintiffs. But, according to that custom, landing is ordinarily effected by landing the cargo on the beach; but, for the convenience of the ship, Ramanjulu Nayudu and Company landed a portion of the plaintiffs' consignment at the pier on the 4th December 1891, though by so doing greater expense was entailed on the consignee. On the 4th December Ramanjulu Nayudu and Company had no authority to deliver, and the plaintiffs had no authority to receive the consignment, the authority to deliver being signed by Binny and Company only on the 7th December. It was on the 8th December that intimation was given to plaintiffs for the first time that a portion of their consignment was landed on the pier, but on the morning of that day between 3 and 4 A.M. there was rain. When the plaintiffs' men first saw the bags of grain, some of them were damaged; the cargo landed on the pier was only delivered to the plaintiffs on the 11th December. For one week after the 8th December, rain continued to fall off and on. There is no evidence to show the specific damage suffered up to 8th December or its increase up to 11th December. On these facts the learned Chief Judge gave judgment for plaintiffs for Rs. 100 damages, contingent on the opinion of this Court upon the case stated for its decision. He held that the landing was the act of the defendants, that the landing of a portion of the consignment on the pier was unauthorized and that damage resulted therefrom. He disallowed the defendants' contention that, under clause (1) of the Bill of Lading No. 1, the defendants' obligation to deliver was fully satisfied when the cargo was discharged from the ship into boats. The contention before me is that defendants' obligation was fulfilled upon the true construction of the bill of lading when the cargo left the ship's tackles. But the bill of lading provides that the company is to have the option of delivering the goods into the receiving ship or of landing them at consignee's risk and expense as per scale of charges to be seen at the agents' office, the company having a lien on all or any part of the goods against expenses incurred on the whole shipment, and that the company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage however caused. It goes on to state that, "If stored in receiving "ship, godown, or upon any wharf, all risks of fire, dacoity, vermin "or otherwise shall be with the merchant, &c." Under the bill

of lading the defendants clearly had the option of landing, and in the case now before me they elected to land, but landed a portion of the consignment on the pier for the ship's convenience contrary to the custom of the port. It was admitted by the defendants' solicitors that landing included delivery and Ramanjulu Nayudu and Company are found by the learned Chief Judge to be defendants' agents. I am of opinion that the decision of the learned Chief Judge is correct, and I answer the question referred to this Court in the affirmative.

Against this decision the defendants preferred an appeal under section 15 of the Letters Patent.

Mr. *J. G. Smith* for the defendants. Appellants contended that it is the duty of the consignee to take delivery of cargo, and if he does not within reasonable time, shipowner may warehouse the goods (*Meyerstein* v. *Barber*(1)). The consignee may demand delivery into boats and, if he does so, shipowner will be liable for wharfage charges (*Syeds* v. *Hey*(2)), that the plaintiffs had no delivery telegram and made no demand. The shipowner is not bound to give notice of the ship's arrival to the consignee (*Harman* v. *Clarke*(3)). After the cargo left the ship's tackling, defendants not responsible (*Mackinnon* v. *Minchin*(4)), (*Bullock Brothers* v. *Toay Aung*(5)). Defendants delivered the goods to the Harbour Trust to be stored, subject to the ship's lien for freight—Madras Act II of 1886, section 52.

Mr. *W. Grant* for respondents. No appeal lies. This decision under section 617, Civil Procedure Code, by *Muttusami Ayyar*, J., is not a judgment. Defendants are carriers and were bound to land according to custom of the port. The custom is to land in the beach and not in the pier. Landing at the pier entailed extra expense on the consignees, and they did not authorise such landing. There was no delivery to consignees (*Bourne* v. *Gatliffe*(6)).

JUDGMENT.—This is an appeal under the Letters Patent against the decision of Sir T. Muttusami Ayyar, J. upon a case referred to the High Court by the Chief Judge of the Presidency Small Cause Court. It was objected on the plaintiffs' behalf that no appeal lay; but we were of opinion that the decision was a judgment within the meaning of the clause of the Letters Patent. Moreover, it has to be observed that, under the rules of the High

(1) L.R., 2 C.P., 38. (2) 4 T.R., 260. (3) 4 Camp., 159.
(4) 6 M.H.C.R., 353. (5) 24 W.R., 74. (6) 7 Manning and Granger, 850.

THE BRITISH INDIA STEAM NAVIGATION COMPANY v. IBRAHIM SULAIMAN.

Court, the reference ought, in the first instance, to have been heard before a bench of two Judges.

The question raised is whether under the circumstances stated the defendants' company is liable for damage suffered by goods in consequence of their being exposed to rain on the pier where they were landed by the company. The opinion of Sir T. Muttusami Ayyar, J. which was in accordance with that expressed by the learned Chief Judge, was based on the finding that the landing of the goods by the company on the pier was an unusual and unauthorized act. It is found that the steamer arrived at Madras on the 4th December 1891, and that the defendants' agents unloaded the cargo and landed the plaintiffs' bags of grain on the pier. Under the bill of lading, the company has the option of landing the goods. From the date when the goods were so landed till the 11th December, when the plaintiffs took delivery of them, the goods remained in the custody of the Harbour authorities, and it was in that interval of time that the mischief which gives rise to the action occurred. At the time when the ship arrived and the goods were landed, it appears that the plaintiffs were not possessed of the bill of lading; they did not know of the landing of the goods until the 8th December, and we infer that before that day they had taken no action with regard to them. We also infer from the absence of any finding to the contrary, that it was not the fault of the company that the plaintiffs did not have the bill of lading at an earlier date. This being so, the case is one in which the company were not in a position to deliver the goods immediately to the plaintiffs either at the ship's side or on the beach. The master of a ship on its arrival in port is clearly not bound to seek out the consignees of cargo, nor is he bound to wait more than a reasonable time. His responsibility cannot be prolonged for the convenience of consignees. If they are not in a position to take delivery in the ordinary way, which, as appears in this case, is on the beach, the master has the option of landing the goods and warehousing them (*Meyerstein* v. *Barber*(1)).

The existence of the option possessed by the company under the circumstances of this case appears to have been overlooked both by the learned Chief Judge and by Sir T. Muttusami Ayyar J. when they say that the landing of the goods was an unauthorized and unusual act. Neither in the judgment of the former, nor

(1) L.R., 2 C.P., 38.

in the case, which does not give a complete statement of the facts, is it explained what would have become of the goods if they had been landed on the beach, and it is not easy to understand what difference it can make to consignees whether their goods, having to be warehoused, are taken to their destination by the route adopted in this case or by the beach. The only difference apparently lies in the expense. It would be most unreasonable to hold that under no circumstances masters of ships landing cargo in Madras can use the facilities which the Harbour Trust Act affords. The course may be unusual, but it is another thing to say that custom prohibits it, and we do not think it was intended so to find. There are two grounds on which the defendants might be held liable. Negligence might be proved against them, or it might be charged that they had failed to deliver the goods.

There is no evidence of negligence on their part in their handling of the goods, nor is it suggested that the Harbour authorities are not persons to whom goods may be properly entrusted. It is true that the latter did not take good care of the bales, but that circumstance cannot make the defendants liable, if otherwise they were free from blame.

The other ground of liability also fails when once it is admitted that, in the absence of the consignees, the company were entitled to land the goods and put them in the charge of some third person. No other delivery is, under the circumstances, possible. The learned Chief Judge referred to the case of *Bourne* v. *Gatliffe*(1). The decision in that case, which turned upon the pleadings, rests upon a ground which is absent in the present case. The plea was held to be bad, because it did not show that the captain had a right to land the goods, or that a reasonable time had elapsed to enable the consignees to come and receive them. Under these circumstances, it is intelligible that the delivery not being shown to be at a usual place, was held not to be a delivery to the consignees. That decision affords no authority for the position that the delivery in the circumstances of the present case was not in accordance with the contract. The case of *Mackinnon* v. *Minchin*(2) resembles more closely the present case, the bill of lading appears to have been similar and there too the consignee did not present himself to take delivery. We think that the

(1) 7 Manning and Granger, 850. (2) 6 M.H.C.R., 353.

THE BRITISH INDIA STEAM NAVIGATION COMPANY v. IBRAHIM SULAIMAN.

conclusion at which the Chief Judge arrived is wrong and that judgment ought to have been given for the defendants. The costs in this Court will be costs of the suit and follow the result.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1896. January 24.

KUNHI MAMOD (DEFENDANT NO. 1), APPELLANT,

v.

KUNHI MOIDIN (PLAINTIFF), RESPONDENT.*

Muhamadan law—Relinquishment of rights of inheritance—Relinquishment executed before ancestor's death.

A Muhamadan sued to recover his share of the property by his mother deceased. It appeared that before her death he had by a registered deed in consideration of Rs. 150 renounced all his claims on her estate:

Held, that the renunciation was binding on the plaintiff.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of Calicut, in appeal suit No. 535 of 1894, modifying the decree of P. Govinda Menon, District Munsif of Betutnad, in original suit No. 432 of 1892.

The plaintiff sued to recover his one-half share in the estate of his mother who died in 1890. The first defendant was the plaintiff's brother and he pleaded that by a registered document, dated the 15th March 1884, and executed by the plaintiff in favour of his mother, the plaintiff had in consideration of Rs. 150 paid to him in respect of the share in her estate to which he would become entitled on her death acknowledged satisfaction of all his claims thereto and admitted that he had no longer any right whatever to her properties.

The District Munsif held that this instrument was invalid for the reason that the rights thereby renounced had not then vested and he passed a decree for plaintiff. This decree was confirmed with a slight modification by the Subordinate Judge.

* Second Appeal No. 132 of 1895.