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issue of the proclamation had been previously ordered. The proclamation would not have been issued if the batta memorandum had not been put in.

The present case is clearly distinguishable from the case of *Maluk Chand* v. *Beehar Natha* (1). In that case there was nothing more than a payment of batta. There was no written application and no evidence of any oral application. Here there was a written application. The Full Bench decision of the Calcutta High Court in *Ambica Pershad Singh* v. *Surdhari Lal* (2) is an authority for the view that the application of July 10th, 1900, was an application for a step in aid of execution.

It cannot be said the application was not in accordance with law since it was made in the form prescribed by the rules.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

1905. January 9, 10.

HAJEE ISMAIL SAIT

v.

THE COMPANY OF THE MESSAGERIES MARITIMES OF FRANCE AND OTHERS.*

Carriers by sea, liability of, under Common Law—Foreign carrier contracting in Calcutta, Law applicable to—Negligence and misfeasance.

Carriers by sea, for hire, are common carriers by the Common Law of England; and, where the contract is made in Calcutta, whatever be the nationality of the carriers they will be governed by the *lex loci contractus* which is the Common Law of England.

Mackillican v. *The Compagnie Des Messageries Maritimes De France*, (I.L.R., 6 Calc., 227), not followed.

Under the English Common Law, a common carrier may protect himself from liability for deliberate acts of misfeasance on the part of himself or his servants but he must do so by clear, definite and unambiguous words.

Landing goods in rainy weather instead of delaying delivery is negligence and not misfeasance.

CASE stated, under section 69 of Act XV of 1882, by the Chief Judge of the Court of Small Causes, Madras, in Suit No. 12836 of 1903.

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(1) I.L.R., 25 Bom., 639. (2) I.L.R., 10 Calc., 851.

* Referred Case No. 8 of 1904 stated under section 69 of Act XV of 1882 by J. G. Smith, Esq., Chief Judge of the Court of Small Causes, Madras, in Suit No. 12836 of 1903.

The facts of the case, as stated by the Chief Judge of the Court of Small Causes, were as follows :—

"The plaintiff sues the defendant company for the sum of Rs. 1,356–6–0 being the amount of loss or damage caused to plaintiff by reason of negligence. The plaint states that Messrs. Hajee Esack Saib & Co. at Calcutta, plaintiff's agents, shipped to the plaintiff, Hajee Ismail Sait, at Madras, as consignee, a cargo of 500 bags of Bengal oats per S.S. *Dupleix*, a steamship belonging to the defendant company ; that the steamer arrived in the Madras Harbour on 27th October 1902 ; that the plaintiff took delivery of 200 bags which were landed in good order and condition and that the remaining 300 bags were landed in a wet and damaged condition. The plaint then states that the plaintiff, after giving due notice to the defendants, held an official survey and sold the goods by public auction, the defendants having been previously given notice of such sale, and realised thereby a net sum of Rs. 1,031–1–0. The plaint further states that the market value of the said 300 bags at Rs. 6–12–0 a bags amounted to Rs. 2,025 and that Rs. 362–6–0 was paid by plaintiff by way of survey fees, storage, demurrage, etc. The plaintiff averred in the plaint that the damage to the goods was owing to the negligence and misfeasance of the defendant company in landing the said goods which they did in pursuance of the provisions of the bill of lading issued by the defendants, and prays judgment for Rs. 1,356–6–0, being the difference between Rs. 2,387—the market value of the 300 bags, together with Rs. 362–6–0, costs of storage, survey fees, etc., paid by plaintiff—and Rs. 1,031–1–0, the net sale-proceeds of the goods.

The defendants by their counsel pleaded that (1) there was no negligence, (2) that they were protected by the bill of lading, (3) puts plaintiff to proof of damages, (4) and not indebted.

It appears that, on the 27th October 1902, the date on which the 500 bags were landed in the Madras Harbour, the rain was very heavy amounting to 1·30 inches between 6 A.M. on 27th October and 6 A.M. on 28th October. It appears also that it is the practice of merchants to abstain from making shipments during the monsoon except when the weather is fine and except in cases where the Captain is bound by time and then only in tin-lined case of imperishable goods. It is also in evidence that the cargo was stowed in the holds of the vessel, not on deck, and was raised in slings by means of derricks and then lowered into the boats.

HAJEE ISMAIL SAIT v. THE COMPANY OF THE MESSAGERIES MARITIMES OF FRANCE.

Exhibit X, the coasting abstract kept by the Harbour Trust authorities, shows the condition of the bags at the time they were received by them at the pier, as wet by rain.

With regard to the pleas raised I found for the reasons given in my judgment (copy herewith) (1) that the Captain did not use ordinary and reasonable care, and was guilty of negligence in landing these bags as he did on the 27th October 1902 taking into consideration the state of the weather on that day; but I further found that no negligence was proved with regard to those bags between the time they left the ship's side and the time they reached the pier where the ship's liability ceases on delivery to the Harbour Trust. (2) I found that the defendant company is not liable as they are protected by article 2 of the bill of lading. (3) There is no dispute as to the damages if the defendant company is liable. (4) I found the defendant's company not liable. I therefore dismissed the suit with costs and counsel's fee Rs. 100 and Attorney's fee Rs. 60. At the request of the plaintiff I made my judgment contingent on the opinion of the High Court on the following question:—

"Whether under the bill of lading the defendants are liable to the plaintiff."

Mr. *E. Norton* for plaintiffs.

Mr. *A. Read* for defendants.

JUDGMENT.—Goods were carried on the defendant's ship, the *Dupleix*, from Calcutta to Madras under a bill of lading which contains a clause that "the company is not answerable for any fault or negligence whatsoever of its Captain; nor for that of pilots, seamen, or other persons on board its vessel in whatever capacity."

On arrival at Madras the goods were delivered by the defendants in rain and part of them were damaged by wet. The plaintiff claims damages from the defendants for negligence and misfeasance in delivering these goods so damaged. At the hearing, the learned Chief Judge of the Small Cause Court dismissed the suit holding that the defendants were protected by the above clause, but has stated a case for the opinion of this Court on the question "whether under the Bill of Lading the defendants are liable to the plaintiff." On behalf of the plaintiff it was contended that the defendants were not common carriers (as was held in *Mackillican* v. *The Compagnie Des Messageries Maritimes*

De France(1)), but were bound by the Contract Act and could not contract themselves out of their liability as bailees and that, even if they were common carriers, they were not protected by the clause in question as their act in delivering the goods in monsoon rain was misfeasance and not mere negligence.

As regards the first question, we are of opinion that the defendants are common carriers. The only reason given in *Mackillican* v. *The Compagnie Des Messageries Maritimes De France*(1) for holding that they were not common carriers is that the defendant's ship is a foreign ship. The defendants are a company who carry goods for any person for hire between certain termini on a certain route. The contract was made at Calcutta and, whatever the nationality of the defendants or their ship, the law applicable to them is the *lex loci contractus*. The *lex loci* is the law of England; the defendants are therefore in our opinion common carriers and the English law as to common carriers applies to them.

By the English law applicable to common carriers, the common carrier may enter into any contract so as to protect himself, but he can only do so by clear, definite, and unambiguous, words. If therefore the words used in the exemption clause of the bill of lading are clear, definite and unambiguous, they may suffice to protect the shipowner even from deliberate acts of misfeasance on the part of himself or his servants. On arrival at Madras the defendants delivered the plaintiff's goods, which were oats, in heavy rain and allowed them to get wet in the process. They might, if they had chosen to do so, have taken the goods on and not delivered them until later when it was fine; and the plaintiff contends that their act in delivering the goods in rain instead of delaying the delivery until it was fine, was an act of deliberate misfeasance and not mere negligence as the learned Chief Judge has found in the case stated. We think the acts of the defendant's servants amounted only to negligence and that the learned Chief Judge is right in so holding. We further think that the words of the clause above quoted are sufficiently clear and definite to protect the defendants and we answer the question referred to us in the negative.

Mr. *James Short*—Attorney, for plaintiffs.

Messrs. *King & Josselyn*—Attorneys, for defendants.

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(1) I.L.R., 6 Calc., 227.