APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

P. K. P. S. SIVANANDAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

BATCHU SURAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1924, December 4.

Contract — Charterparty — Advance freight — Meaning of — Advance, made by charterer—Ship stranded before loading of cargo—Voyage not begun by ship—Advance, whether recoverable by shipper—English rule as to advance freight, whether and when applicable.

On a contract of charterparty, the charterer advanced a sum of money on the date of the contract, which was to be taken in part payment of freight on loading, the balance being payable at the port of destination. The ship, however, did not start on its voyage, as it stranded before reaching the port fixed for loading. On the charterer suing for return of the money advanced by him, the owner contended that the amount was not recoverable as being advance freight;

Held, that advance freight does not arise until the voyage has actually begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading;

that the advance in this case did not amount to advance freight, and that consequently the plaintiff was entitled to recover from the defendants the amount paid by him.

Allison v. *Bristol Marine Insurance Co.*, (1875) 1 A.C., 209; *Smith Hill & Co.* v. *Pyman, Bell & Co.*, [1891] 1 Q.B., 742 followed; *A. Coker & Co., Ltd.* v. *Limerick Steamship Co.*, (1918) 118 L.T., 726, distinguished.

APPEAL against the decree of BALARAMADAS, Subordinate Judge of Cocanada, in Original Suit No. 21 of 1921.

The material facts appear from the judgment.

K. V. Krishnaswami Ayyar and N. S. Rangaswami Ayyangar for appellant.—Advance freight has not been

*Appeal No. 138 of 1923.

SIVANANDAM CHETTIAR v. SURAYYA.

earned in this case as the vessel did not start. Freight is the consideration for the carriage of goods—as the vessel never started, the consideration did not come into force. See *Smith Hill & Co.* v. *Pyman Bill & Co.*(1), *Allison* v. *Bristol Marine Insurance Co.*(2). The technical rule of English law as to the irrecoverability of advance freight applies only when the vessel has started on the voyage—see *Weir & Co.* v. *Girwin & Co.*(3). The vessel in this case was not in a position to start. This is not an advance freight within the meaning of the term.

P. Somasundaram for respondent.—There is no such distinction in law, as contended for the appellant. It is immaterial whether the ship started on the voyage or not. The law has been laid down in unqualified terms by the Law Lords in *Allison* v. *Bristol Marine Insurance Co.*(2). The cases cited for the appellant are all cases where there was a condition precedent to be fulfilled before the payment of advance freight and as the condition was not fulfilled, the ship owner was held not entitled to the advance freight. Here the charterparty clearly treats the payment as "Advance freight," and so it is not recoverable whether the voyage commenced or not. The defendant was ready and willing to place another vessel at the disposal of the plaintiff. The decision in *A. Coker & Co., Ltd.* v. *Limerick Steamship Co., Ltd.*(4) is an authority in favour of the respondents. It is a privilege of the ship-owner to replace the lost vessel by another and to carry the goods. The Indian Contract Act does not apply to common carriers. The contract of charterparty is governed by the provisions of the law of common carriers. See *Kumber* v. *The British India Steam Navigation Co., Ltd.*(5).

(1) (1891) 1 Q.B., 742 at 744.
(2) (1875) L.R., 1 A.C., 209.
(3) [1900] 1 Q.B., 45.
(4) (1918) 118 L.T., 726.
(5) (1915) I.L.R., 38 Mad., 941.

JUDGMENT.

ODGERS, J.—This was a suit for the recovery of a sum of Rs. 6,600 payable on a contract of charter, party (Exhibit A) entered into between the plaintiff and defendants. The Subordinate Judge has held that by the terms of Exhibit A this sum was in fact paid by the plaintiff as "advance freight" which is by a doctrine peculiar to the English Law, irrecoverable. How this occurs is explained by BRETT, J., in *Allison* v. *Bristol Marine Insurance Company*(1). The plaintiff has appealed. Exhibit A after clauses contracting for two voyages of the defendants' barque "Bhagyalakshmi" from Akyab to Jaffna proceeds, "Payments of freight at the above rates to be made as:—

1. Rs. 6,600 (Rupees six thousand six hundred only) advance on acceptance of the charterparty, paid by charterers' representative Sabapathy Chettiar at Cocanada, subject to deduction of Rs. 3,300 per trip on loading.

2. Rs. 3,300 to be paid in Akyab per each trip at the time of loading.

3. The balance freight as the vessel reaches her destination and lands the cargo."

Thus the whole sum of Rs. 6,600 was payable on signing Exhibit A, but half of it was to be notionally distributed at Akyab on each trip *at the time of loading there*. Exhibit A was made on 9th October 1919, the first voyage was to be in January 1920 and the second February-March 1920.

The money was paid, but no voyage was made according to the charterparty by the "Bhagyalakshmi," as she stranded on the Nellore Coast while proceeding to Akyab to load for her first voyage.

(1) (1875) L.R., 1 A.C., 209 at 226.

SIVANANDAM CHETTIAR v. SURAYYA.

ODGERS, J.

The question is whether this sum of Rs. 6,600 is advance freight. In Leake on Contracts (7th edition), page 73, the doctrine as to advance freight is said to be an example of money paid for an executed consideration, if it was in fact the consideration bargained for, cannot be recovered back merely on the ground that it proved to be of no value. The learned author says:

"Upon this principle freight paid in advance cannot be recovered back after the voyage has commenced, though the goods are lost during the voyage; for it is the uniform though perhaps anomalous rule that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea."

The words to be noted here are "after the voyage has commenced."

In *Weir & Co.* v. *Girvin & Co.*(1), VAUGHAN WILLIAMS, L.J., at page 52 refers to the old view that advance freight was different from freight and meant a loan or a sum payable when goods were put on board in consideration of their being received on board. The opinions of the Law Lords in *Allison* v. *Bristol Marine Insurance Company*(2), make it clear that

"Freight whether used in respect of advanced freight or otherwise, always has the same meaning. The practical difference between advanced freight and freight is a difference arising from the stipulations which are made as to payment."

Lord ESHER, M.R., in *Smith Hill & Co.*, v. *Pyman, Bell & Co.*(3), says:—

"Now there are two peculiarities of the English Law as regards freight; first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced, although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the ship-owner; and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is *payable at the moment of starting*, and, even if not paid, can be

(1) [1900] 1 Q.B., 45. (2) (1875) 1 A.C., 209 at 226.
(3) [1891] 1 Q.B., 742.

recovered by the ship-owner from the charterer upon the loss of the ship."

Advance freight is then payable "at the moment of starting" or in other words the ship must sail, unless there is some special contract to the contrary. As against this Mr. Somasundaram for respondents relies on *A. Coker & Co., Ltd.* v. *Limerick Steamship Co., Ltd.*(1), where freight was on the contract payable in Liverpool before sailing on signing the bills of lading. Some of the bills were signed and the House of Lords held that under the agreement a proportional part of the advance freight became payable on the signing of each bill of lading. The question turned on the construction of the charterparty. In the present case no cargo was loaded and no bills of lading signed. The case in the House of Lords can have no bearing on it. It appears to me therefore that the present payment of Rs. 6,600 can in no sense be viewed as advance freight. It was a pure advance made to the defendants on account of what would be payable to them as freight by the plaintiff but the conditions precedent, viz., the starting of the voyage or at least of loading were absent to make it amount in law to advance freight. The wording of clauses (1) and (2) above proves this and there are no special clauses, e.g., as to freight being payable on signing bills of lading.

A faint attempt was made to argue that the defendants were competent to substitute another vessel, the "Mahalakshmi" for the "Bhagyalakshmi" and were entitled to compel the plaintiff to accept her. The documents show that some such proposal was made. The Subordinate Judge has held that it never got beyond the stage of proposal and that plaintiff never consented to the substitution. The authority of Carver's

(1) (1918) 118 L.T., 726.

SIVANANDAM CHETTIAR v. SUBAYYA.

ODGERS, J.

"Carriage by Sea" (article 304), clearly shows that a ship-owner is only entitled to compel the acceptance of a substituted ship after the voyage in the ship contracted for has begun, which is not the case here. The appeal must be allowed with costs throughout; interest will be calculated at 6 per cent from date of plaint.

PHILLIPS, J.

PHILLIPS, J.—I agree. I am quite clear that neither under the contract, Exhibit A, nor under the doctrine of English Law can the Rs. 6,600 advanced be treated as "advance freight." "Advance freight" must connote freight, and it is clear from the authorities referred to by my learned brother that the idea of freight does not arise until the voyage has actually begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading. In this case the ship has never been loaded, nor was it attempted to be loaded and, consequently, there can be no question of freight. Even if the provisions of the Indian Contract Act are applied to this case (it is unnecessary to decide this point which has not been argued before us), the plaintiff must succeed under the provisions of section 65, because the contract has become impossible of performance.

K.R.