GOPAL NAIDU v. MOHANLAL KANYALAL. — COUTTS TROTTER, C.J.

in forming the conclusion that the supposed deed of dissolution of partnership was a sham. It is open to Mr. Thanikachalam Chetti, on a proper view of the documents and the circumstances which were not put forward before, to say that the learned Judge is right and it was a sham. In the view we have taken it is not necessary for us to deal with that point at all and we are content to decide on the ground that has been argued before us.

The result will be that the appeal is allowed. Costs of the appeal of both sides on the Original Side scale will come out of the estate.

V. Varadaraja Mudaliar, Attorney for appellant.

Short Bewes & Co., Attorney for respondent.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Viswanatha Sastri.

1925, August 24.

GANDHA KORLIAH (PLAINTIFF), APPELLANT

v.

JANOO HASSAN (DEFENDANT), RESPONDENT.*

Sections 32, 56 *and* 65, *Contract Act* (*IX of* 1872), *Charterparty —Impossibility of voyage—Advance freight paid, right to recover.*

Advance freight paid by a shipper to a shipowner under a charterparty can under the Indian Contract Act be recovered back on the frustration of the venture, owing to circumstances which were beyond the control of the parties, and which they had not warranted not to exist. *Sivanandam Chettiar* v. *Surayya*, (1925) I.L.R., 48 Mad. 459 and *Boggiano & Co.* v. *The Arab Steamers Co., Ltd.*, (1916), I.L.R., 40 Bom. 529, followed.

Quære: Whether a chartered ship is a common carrier?

ON APPEAL from the judgment of the Honourable Mr Justice WALLER passed in the exercise of the Ordinary.

* Original Side Appeal No. 83 of 1924.

Original Civil Jurisdiction of the High Court in C. S. No. 9 of 1923.

The facts are given in the following Judgment of WALLER, J. :—

"This is a suit to recover Rs. 7,700 by way of liquidated damages. On December 30th, 1919, defendant chartered from plaintiff two schooners to carry bags of rice or paddy from Akyab to certain ports in the Madras Presidency. Two trips were to be made, one after 15th January and the other in March 1920, the cargo on each trip to consist of 2,200 bags. In the event of a breach of the contract, the damages were fixed at a sum of Rs. 7,700 and defendant paid Rs. 1,050 in advance. The schooners were ready at Akyab at the required times but defendant failed to provide the necessary cargoes. Plaintiff therefore sues to recover Rs. 7,700 minus the amount paid in advance. Defendant denies liability and counter-claims for the Rs. 1,050 paid in advance.

II. *The following issues have been framed*—

1. Whether the defendant is exempted from the performance of the suit contract for reasons alleged in paragraphs 5, 6 and 7 to 12 of the written statement;

2. Whether the plaintiff was aware of the said terms and conditions mentioned in paragraph 7 of the written statement at the time of entering into the suit contract?

3. Whether the allegations in paragraphs 9 and 10 of the written statement are true?

4. Whether it was an implied condition for the performance of the contract, that native craft licences should be obtained and whether the plaintiff was informed and aware of the same?

5. Whether the defendant committed breach of contract?

6. To what damages is the plaintiff entitled?

7. Whether the defendant is entitled to the amount of the counter-claim?

8. To what relief is the plaintiff entitled?

III. At the time when the charterparties were executed, a Government order was in force prohibiting the export of rice without a licence. Plaintiff contends and has gone into the box to swear that he was, at the time, unaware of this order and that it was not in the contemplation of the contracting parties when

GANDHA KORLIAH v. JANOO HASSAN.

the contracts were made. I may say at once that I do not believe him. The transaction was arranged by a broker called Janardhanam who lives at Akyab. Admittedly this man was aware of the order in question. Plaintiff was staying with him on 30th November 1919 and had been staying with him for some time before that. I find it quite impossible to believe that any party to the transaction was ignorant of the fact that the procuring of a licence was necessary before the contracts could be performed.

My conclusions on the facts are these—

(*a*) That the parties were aware that a licence was required before rice could be exported ;

(*b*) that defendant had the cargoes ready ; this is admitted by Janardhanam ;

(*c*) that he endeavoured on each occasion to get a licence, but failed.

IV. The main question in the suit is whether it was an implied condition of the contracts that licences should be obtained. I have no difficulty in finding that it was. Defendant would not, I think, have bound himself absolutely to pay a large sum by way of damages on the uncertain contingency of securing a licence. There is nothing in the charterparties which justifies the conclusion that he warranted himself to get licences.

On the finding that the contracts were made on the implied condition that licences should be obtained, the contracts, in my opinion, became void when defendant applied for but failed to get the licences. In an English case, where the facts were very similar to those now under consideration, *In re Anglo-Russian Merchant Traders and John Batt & Co.*(1), Lord READING, C.J., remarked that, in his opinion, the implied obligation was not an absolute obligation to ship, but an obligation that the sellers should use their best endeavours to obtain a permit. He added that he was unable to see why the law should imply an absolute obligation to do that which the law forbids. The same view was take nby SCRUTTON, L.J. Where an event assumed as the foundation of a contract does not happen, the promisor so long as the fault is not his, is discharged ; vide *Krell* v. *Henry* (2).

It is not necessary to consider the other English decisions cited, for it seems to me clear that on the facts found either

(1) [1917] 2 K.B., 679. (2) [1903] 2 K.B., 740.

section 32 or section 56 of the Contract Act applies. The implied condition was that cargo should be supplied on the obtaining of licence, which was an uncertain future event. The event became impossible owing to the refusal of the controller to issue licences and as a result the contracts became void (section 32 of the Contract Act). The terms of paragraph ii of section 56 appear to be equally applicable.

Plaintiff's suit must therefore be dismissed with costs. Defendant's counter-claim is resisted on the strength of several English decisions, e.g., *Civil Service Co-operative Society* v. *General Steam Navigation Co.*(1) and *Chandler* v. *Webster*(2). The law of England no doubt is that under the circumstances of a case like this, the contract is good up till the point at which performance becomes impossible and that payments made before that point has been reached cannot be recovered. Sir Frederick Pollock points out that this statement of the law does not commend universal approval in the legal profession. In any event it is not a correct statement of the law in this country, which is to be found in section 65 of the Contract Act—vide *Boggiano & Co.* v. *the Arab Steamers Co., Ltd.*(3). On the counter-claim I find for defendant. He will recover the advance of Rs. 1,050 with interest at 12 per cent from the date of the contract till the date of decree. Subsequent interest at 6 per cent. Plaintiff will pay his costs on the counter-claim."

The plaintiff preferred this appeal only as against the allowance of defendant's counter-claim.

S. Srinivasa Ayyar for appellant.

K. Sundara Rao for respondent.

JUDGMENT.

This case raises a point of some interest that has been much discussed in the English Courts and has very recently been the subject of a decision by Mr. Justice MACLEOD as he then was, sitting in the High Court of Bombay. (*Boggiano & Co.* v. *The Arab Steamers Co., Ltd.*(3). It is not disputed by the appellant that if

(1) [1903] 2 K.B., 756. (2) [1904] 1 K.B., 493.
(3) (1916) I.L.R., 40 Bom., 529.

GANDHA KORLIAH v. JANOO HASSAN.

Mr. Justice MACLEOD's judgment is correct he is out of Court. The plaintiff was the owner of two steamers which were chartered by the defendant for the carriage of rice from Akyab to the Coromandel Coast. The importation of rice was only permitted—and Mr. Justice WALLER, the trial Judge, has very rightly found that this was a fact perfectly within the knowledge of the parties—if and when a certificate could be obtained from the Food Comptroller. The learned Judge has also rightly found, and this part of his judgment is not challenged, that neither party to the contract committed himself to a guarantee that such a certificate would be forthcoming. As to that no question arises and the learned Judge therefore thinks that the execution of the contract became impossible owing to an act which is neither under the control of the parties nor which they had put themselves in the position of having warranted to be in existence, namely, the certificate. In these circumstances the shipper says that he is entitled to be paid back certain moneys which he had paid to the shipowner and these moneys are described in the contract as being paid for freight at the rate provided for in the charterparty :

"1. Rs. 450 only advance on acceptance of charterparty and to be deducted from the freight of second trip.

"2. Half of the freight to be paid as the vessel reaches Akyab and takes the cargo.

"3. The balance freight to be paid as the vessel reaches the port of destination."

It is sought to be said by the appellant in this case that this contract between the parties is not to be regarded as being governed by the general law of India laid down in the Contract Act but by the English common law. The appellant's vakil has very properly accepted the position that in circumstances such as the present the money that passed from one hand to the other

is recoverable by Indian law but irrecoverable by the English common law. If that were all that was to be said about it, it is quite plain that we should have to be guided by the statute law that obtains in this country and should not be justified in going past the Indian statute to the English common law, but a very ingenious argument is put forward, the same argument that was really put forward in the Bombay case. It is said that a ship in this position is a common carrier and that in accordance with the decision of the Privy Council in *The Irrawaddy Flotilla Company* v. *Bugwandas*(1) the contract between the parties is not to be supposed to be governed by the Indian Contract Act but by the English common law regarding the liabilities and rights of common carriers. It is said that the moment you show that a person is a common carrier you have proved the existence of a certain type of contract of a special kind which, according to the Privy Council decision, is not governed by the provisions of the Indian Contract Act. There appear to me to be two objections and the first is this: that it is more than doubtful whether a ship under charter as distinct from a general ship taking the goods of several shippers under separate bills of lading on the same voyage is properly described as a common carrier at all. It is not necessary to decide that point fortunately in this case but it is one that has been frequently discussed in commercial circles and amongst commercial lawyers for the past 70 years and there are a very considerable number of expressions of opinion by eminent commercial lawyers on the bench that a chartered ship is not a common carrier. If that be right, the appellant's case is ended at once. It appears to me that we can put the case on an even more solid footing

(1) (1891) I.L.R., 18 Calc., 620 (P.C.).

GANDHA KORLIAH v. JANOO HASSAN.

than that in the following way. Let us assume that in a contract of carriage by sea all those features which are peculiar to the contract of affreightment are governed by the English common law and therefore would not be touched even in this country by the provisions of the Indian Contract Act. But there are other incidents in the relation of ship-owner and shipper in a contract of affreightment which are in no way peculiarly confined to a contract of affreightment and which are independent of the special provisions of maritime law. That that is so, I think, is clear from many of the cases which were cited before us, so that the question narrows itself down to this, is money paid in the present circumstances by way of an advance freight, a special feature of a contract of affreightment deriving all its validity and force from the law maritime or does it derive its validity and force from the general English common law? The answer is to be found in the decision of the divisional Court in *Blakeley* v. *Muller*(1), which is reported as a footnote to *Civil Service Co-operative Society* v. *General Steam Navigation Company*(2). There CHANNELL, J., dealing with one of the Coronation cases as they are commonly called expressly says that it is an incident of the English common law and says that it is the same principle of the common law which prevents the refunding of advance freight on a charterparty where "the voyage is not completed and the freight therefore not earned." That way of putting it was assented to in the judgment of the EARL OF HALSBURY, L.C., Lord ALVERSTONE, C.J., and COZENS HARDY, L.J., where after citing the passage which I have read, the EARL OF HALSBURY, L.C., says he concurs with every word of that. If that be the right

(1) (1903) 88 L.T., 90. (2) (1903) 2 K.B., 756 at 760.

principle that was laid down by CHANNELL, J., it follows that the inability in England to recover advance freight on the frustration of the venture is derived from the general principles of the common law and not from any supposed peculiar incident attaching to maritime contracts of affreightment. That being so, even if a chartered ship is a common carrier, the answer would be that matters relating to the recoverability of freight paid in advance although they happen to occur in a charterparty which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary common law or statute law, whether English or Indian. Then you get back to this position: that being the common law of the land or the statute law of the land—and the general principle is different in India from what it is in England—therefore, just as we should apply the common law in England, so we should apply the express statute that obtains in India. It therefore seems to me that we should take the view that, whether a chartered ship is a common carrier or not, nevertheless the general principle of the Indian Contract Act applies and advance freight when paid can be recovered back by the shipper on the frustration of the venture. That appears to be in accordance with the view expressed by PHILLIPS and ODGERS, JJ., in *Sivanandam Chettiar* v. *Surayya*(1). Our decision is also in accordance with that in the *Boggiano & Co.* v. *The Arab Steamers Co., Ltd.*(2) with which we respectfully agree. The appeal will be dismissed with costs.

N.R.

(1) (1925) I.L.R., 48 Mad., 459. (2) (1916) I.L.R., 40 Bom., 529.