**ADESANYA**

**v.**

**HOEGH**

SUPREME COURT OF NIGERIA

15TH NOVEMBER, 1968.

SUIT NO. SC 374/1967

**LEX (1968) - SC 374/1967**

OTHER CITATIONS

2PLR/1968/8 (SC)

**BEFORE**

GEORGE BAPTIST A. COKER, J.S.C.

IAN LEWIS, J.S.C.

CHARLES OLUSOJI MADARIKAN, J.S.C.

**BETWEEN**

FASASI ADESANYA (Trading under the name and style of Negro Commercial Agency)

AND

LEIGH HOEGH AND CO. A/S

**ORIGINATING COURT**

LAGOS HIGH COURT (Adefarasin J., Presiding)

**REPRESENTATION**

ADEFALE - for the Plaintiff/Appellant

IMPEY (with him ADESINA) - for the Defendants/Respondents

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMIRALTY AND SHIPPING LAW:- Goods shipped under a bill of lading – Rule that same may be made deliverable to a named person or to a name left blank or ‘to bearer” – Proper treatment of

ADMIRALTY AND SHIPPING/MARITIME LAW:- Carriage of goods by sea under a bill of lading– When shippers are deemed agent of sellers - Liability of shippers for losses occasioned by acts authorized by sellers

ADMIRALTY AND SHIPPING/MARITIME LAW:- Contract of carriage of goods by sea- Deviation from contractual route of carriage – How proved

ADMIRALTY AND SHIPPING/MARITIME LAW:- Contract of carriage of goods – Diversion – Discharge of goods using mode not prescribed under bill of lading - When justified

AGRICULTURE AND FOOD LAW:- International transport of perishable goods - Consignment of potatoes transported in ship’s cool chamber stowage – Liability of shippers for post-discharge loss or damage arising from storage conditions incompatible with that on ship – Where consignment delivered in good condition – How treated

BANKING AND FINANCE LAW:- Banking practices – Commercial transactions under a bill of lading – Bank endorsing bill of lading to third party – When justifiable

COMMERCIAL LAW – BUSINESS TRANSACTIONS - BILL OF LADING:– Nature of contract – When property passes – Person not named therein or indorsed thereunto – Whether entitled to right of action thereunder

COMMERCIAL LAW – CONTRACT:- Designated mode of communicating delivery of goods pursuant to a bill of lading – Designated contact person with only a post-office box number - Difficulty of reaching that person - Endorsement of bill of lading to third party by seller through their agent to ensure discharge of cargo at port – Where goods delivered in good condition – Liability of sellers for spoilage subsequently occasioned

COMMERCIAL LAW – CONTRACT:- Negligent performance of contract of carriage of goods by sea – How proved – Need to distinguish same from claims under the tort of negligence

COMMERCIAL LAW – CONTRACT:- Sale of goods and Privity of contract pursuant to a bill of lading – Parties recognized thereunder - How determined – Implication for right of action/locus standi

INTERNATIONAL TRADE – BILL OF LADING:- Actions based on passing of property under a bill of lading and rights in a C.I.F. contract – Distinction of both from right to bring an action on the bill of lading itself by a person who was not, the consignee or endorsee – Legal implications

INTERNATIONAL TRADE – BILL OF LADING:- Consignees on the bill of lading – Right of assignment – When deemed properly exercised - Where printed words on a particular bill of lading is “one original bill of lading must be surrendered duly endorsed in exchange for the goods or delivery order” - Whether endorsement in blank without possession of an original bill of lading is sufficient thereto

INTERNATIONAL TRADE – BILL OF LADING:- Indorsement of – How properly effected - “endorsement in blank” and “endorsement in full” – Meaning of – Distinction between special endorsement and indorsement in blank

INTERNATIONAL TRADE – BILL OF LADING:- Nature of – Privity of contract thereunder – Person referenced to be notified thereunder but whose name in no way appeared on the Bill of Lading – Right to enforce provisions of the bill

INTERNATIONAL TRADE – BILL OF LADING:- Person who is in no way a party to the contract of carriage of goods – Whether has locus stadni to sue on it by proving separate contract with the sellers

INTERNATIONAL TRADE – BILL OF LADING:- Rule that same may be made deliverable to a named person or to a name left blank or ‘to bearer” - Bills of lading making goods deliverable ‘to order,” or ’to order or assigns” – Whether are by mercantile custom negotiable instruments, the indorsement and delivery of which may affect the property in the goods shipped

INTERNATIONAL TRADE – BILL OF LADING:- Status of consignee or endorsee thereunder – How created – Whether an endorsement has to be in writing to be valid - Section 32 of the Bills of Exchange Act (cap 21 of the 1958 Laws of the Federation) in consideration

TORT AND PERSONAL INJURY – NEGLIGENCE:- Claim based on negligent performance of contract – Failure to specifically plead and prove same as the tort of negligence – Duty of court thereto

TRANSPORTATION LAW – SHIPPING:- Contract of carriage of goods by sea under a bill of lading – Nature of rights created – Parties to the contract – Diversion - What amounts to

**PRACTICE AND PROCEDURE ISSUES**

APPEAL – GROUND OF APPEAL:- Validity of ground of appeal based on admission of inadmissible evidence – Failure to specify particulars – Duty of court thereto

WORD AND PHRASES:- “To endorse” – Primary and evolved meaning of

WORD AND PHRASES:- “endorsement in blank” and “endorsement in full” – Meaning of

**MAIN JUDGEMENT**

LEWIS, J.S.C. (DELIVERING THE JUDGMENT OF THE COURT):-

This is an appeal by the plaintiff against the decision of Adefarasin J. on the 23rd of March 1967 in the Lagos High Court in Suit LD/167/66 dismissing his claim with costs. The plaintiffs claim in his writ reads:-

‘The plaintiff’s claim against the defendant is for the sum of three thousand pounds £3,000 being special and general damages for the defendants’ failure to deliver at Lagos in apparent good order and condition the quantity of 557 bags of 1000 bags of Majestic potatotes consigned to the plaintiff under the bill of lading No. 13 of 19/3/65 per defendants’ ocean vessel Hoegh Aurora.

Particulars of damage

Value of 557 bags of Majestic Potatotes which were delivered rotten £1,949:10:-

Survey Report Fees 10:10:-

Total fees paid to Intercotra Limited as per Invoice No. 2650/13 10/65 of 12/4/65 199:17:2

£2.159:17:2

Brought Forward £2,159:17:2

General Damages 840:72,10

£3,000:00:

and the first three paragraphs of his statement of claim read:-

“1. On March 19, 1965, Messrs Awan Lee and Luba Company Ltd., through their agents, Messrs Turner Byme AND John Innes Limited caused a quantity of 1,000 bags of Majestic Potatotes with marks “N.C.A. Lagos 1/1000” to be shipped on board the defendant’s ocean vessel “Hoegh Aurora” at Lon-don.

2. The master of the said ocean vessel, as the agent of the defendants received the 1,000 bags of Majestic Potatotes to be carried to Lagos (Customs Wharf) and on demand of the shipper issued a bill of lading No. 13, duly signed at London on the 19th day of March, 1965.

3. The plaintiff is the consignee of the 1,000 bags of Majestic Potatoes named in the bill of lading to whom the property in the goods therein mentioned passed by reason of such consignment.”

Now the facts in this appeal as found by the learned trial judge were that the plaintiff in Lagos arranged with Messrs. Awan Lee AND Luba Company Ltd. in England through their agents Messrs. Turner Byrne AND John Innes Ltd. to purchase 1,000 bags (50 tons) of Majestic Potatoes for £1,837.10/-. The sellers made the necessary arrangements to ship the goods and informed the plaintiff that they were to be shipped by M.V.Hoegh Aurora and that the necessary documents would be presented to him “through Barclays Bank D.C.O., 40 Marina, Lagos at sight first presentation.” A bill of lading (exhibit 4) was on the 19th of March, 1965 issued by the sellers” agents. This exhibit 4 shows on its face that 1000 bags of Majestic potatotes were shipped by the agents of the sellers under “Cool Chamber Stowage,” on M.V. Hoegh Aurora from London to Lagos (Customs Wharf and consigned to order of Barclays Bank D.C.O. 40 Marina, Lagos. One of the terms provided in the bill of lading was “one original bill of lading must be surrendered duly endorsed in exchange for the goods or delivery order.” There also appeared on the bill of lading that Messrs. Negro Commercial Agency, P.O. Box 2029, Lagos were to be notified without liability to the carrier. Subsequently there was endorsed on the bill of lading an order by Barclays Bank D.C.O. Lagos to deliver to the order of Intercotra Ltd. and the bill of lading was finally endorsed with an acknowledgement as received for and on behalf of Intercotra Ltd. It is not disputed that save for the reference to notifying the plaintiff to which we have referred the plaintiff’s name in no way appeared on the Bill of Lading.

The M.V. Hoegh Aurora in fact arrived at Customs Wharf, Lagos, according to the evidence accepted by the learned trial judge, on the 6th of April, 1965 but despite all efforts to find the plaintiff or to contact him at the post office box address which was all he had given they were unable to do so and Barclays Bank D.C.O. being themselves unwilling to take responsibility for the discharge of the cargo to themselves so notified the defendant shipping company who accordingly moved the ship to Apapa Wharf. As the plaintiff had still not been found by the 13th of April, 1965 the M.V. Hoegh Aurora sailed to Port Harcourt retaining on board the consignment of potatotes. It returned to Lagos on the 19th of April, 1965 the defendant shipping company having notified Barclays Bank D.C.O. that as it had no other cargo to discharge in Lagos the ship could deliver the potatoes only by lighter as it was too costly to come alongside a wharf for that cargo alone. Barclays Bank D.C.O. after consulting the sellers in England on their instructions endorsed the bill of lading to Intercotra Ltd. who on the 20th of April, 1965 after the potatoes had been unloaded from the ship’s cool chamber stowage into a lighter took possession of them on the wharf and signed for so receiving them in exhibits 12 and 18 when, according to the evidence of the imports manager of the ports agent of the defendant company which was not challenged in cross examination. In this respect, the potatoes were delivered in good condition.

It was not in fact until the 27th of April, 1965 that the plaintiff was found and he then went to Intercotra Ltd. and paid them their own charges and some £920 customs duty, but on examining the goods he observed a smell from them and so called in an Independent surveyor who found that 557 of the bags were rotten. The plaintiff accordingly decided to sue the defendant shipping company for the selling price of the bad 557 bags of potatoes together with the cost of the surveyor’s fee and some of the costs he paid Intercotra Ltd. and also claimed general damages alleging a breach of the contract of carriage in the following terms in paragraph 22 in his statement of claim:-

“22. At the trial, the plaintiff will rely on the foregoing facts as constituting breach of the said contract of carriage in that:

(a) The Hoegh Aurora deviated.

(b) That the defendants did not make the holds, refrigerating and cool chambers, and all other parts of the lighter “Niger Creek” in which goods were carried, fit and safe for their reception, carriage and preservation.

(c) The defendants did not properly carry, keep and care for the 557 bags of potatoes.

(d) The defendants have failed to deliver the 557 bags of potatoes in apparent good order and condition.

(e) Potatotes are usually discharged at Lagos Customs Wharf into sheds from where they could be removed by their consignees.”

Mr. Adefala for the plaintiff/appellant has argued four grounds of appeal as we did not allow him to argue another ground of appeal when he alleged inadmissible evidence had been admitted because he had not specified what it was.

On the first ground of appeal, which reads:-

“1. The learned trial judge erred and misdirected himself in law in holding that there was no contract between the plaintiff and the defendant.”

Mr. Adefala argued at great length that the plaintiff was entitled to sue under the bill of lading, as counsel maintained that the plaintiff was consignee or alternatively an endorsee. Counsel put his case in this way:-

There was a C.I.F. contract between the plaintiff and the sellers and arising from that the goods were shipped on the bill of lading C/O the order of Barclays Bank D.C.O.” Counsel submitted that the property in the goods did not pass to Barclays Bank D.C.O. as they were not parties to the original contract but Barclays endorsed to Intercotra Ltd. so that when the plaintiff paid Intercotra Ltd. their outstanding fees he became the endorsee and so in place of the consignee in respect of the bill of lading for the purposes of section 1 of the Bills of Lading Act, 1855 which reads as follows:-

“1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.”

Counsel concedes that the plaintiff’s name does not appear (other than the reference to his being notified) on the bill of lading (exhibit 4) but nonetheless he submits that he must be treated as an endorsee for the purpose of section 1 of the Bills of Lading Act, 1855 because the property in the goods had not passed till the plaintiff took possession of them as no one else had any contract in respect of them with the sellers.

Mr. Adefala cited to us passages from a number of authorities referred to in Carver’s Carriage of Goods by Sea 10th Edition, but when reports are referred to we prefer to go to reports themselves, when they are available, to see fully what was decided and here the three authorities in fact referred to were: (1) Sewell v. Burdick (1884) 10 App. Cap 74, (2) Biddell v. Horst Company [1911) 1 K.B. 214 and (3) Mirabita v. The Imperial Ottoman Bank (1878) e Ex.D. 164. Sewell v. Burdick (1) (supra) decided that when a bill of lading was endorsed by a shipper in blank and deposited with the endorsee as security for a loan, the endorsee not having possession of the goods, this did not pass the property in the goods so as to make the endorsee liable solely by reason of the endorsement in an action by the ship owners for the freight; Biddell v. Horst Company (2) (supra) was dealing with the rights under a C.I.F. contract of a seller to payment against shipping documents upon delivery of the goods on board ship at the port of shipment; and Mirabita v. The Imperial Ottoman Bank (3) (supra) dealt with the passing of property when the seller’s intention was that it should not pass on shipment as he drew the bill of lading on himself, but that in would pass on the proposed buyer’s fulfilling conditions: there was an appropriation of the cargo subject only to payment of the price so, as the purchaser did all he was required to do, the property vested in him. In other words cases (1) and (3) (supra) were dealing with the passing of property and case (2) (supra) was dealing with rights in a C.I.F. contract. They were in no way like the present situation where it was sought to bring an action on the bill of lading itself by a person who was not, in our view, as we will show, the consignee or endorsee.

The primary meaning of to endorse is ‘to write at the back’ and whilst the requirement may sometimes have been tempered so far as it being on the reverse side is concerned we were shown no authority for a person being an endorsee without writing, unless the endorsement be in blank. The requirement in bills of exchange, for instance, for the endorsement to be in writing is shown in section 32 of the Bills of Exchange Act (cap 21 of the 1958 Laws of the Federation) following the English practice (See Byles on Bills 18th Edition p. 153). We have also noted in regard to the effect of endorsement of a bill of lading that Scrutton on Charter-parties and Bills of Lading third Edition at page 129 said:-

“Goods shipped under a bill of lading may be made deliverable to a named person, G., or to a name left blank, or ‘to bearer,” and in the first two cases may or may not be made deliverable ’to order or assigns” Bills of lading making goods deliverable ‘to order,” or ’to order or assigns” are by mercantile custom negotiable instruments, the indorsement and delivery of which may affect the property in the goods shipped. Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an “endorsement in blank,” or by his writing “deliver to 1 [or order], F;” which is called an “endorsement in full,”

So long as the goods are delivered to a name left blank, or to bearer, or the endorsement is in blank, the bill of lading may pass from hand to hand by mere delivery, or may be re- delivered to the original holder without any endorsement, so as to affect the property in the goods. But the holder of the bill may at any time fill in the blank either in the bill or endorsement, or restrict by indorsement the delivery to bearer, such power being given to him by the delivery to him of such a bill of lading.

Semble-A bill of lading which does not contain some such words as ’to order,” or ‘to order or assigns,” or which is indorsed in full, but without such words, is not a negotiable instrument.”

In our view Barclays Bank D.C.O. were clearly the consignees on the bill of lading (exhibit 4) and they assigned to Intercotra Ltd. by special endorsement. Normally a bill of lading could be transferred either by special endorsement, that is, by naming the person to whom it is endorsed in the bill of lading, or in blank if no person is named, but having regard to the printed words in this particular bill of lading to which we have referred, namely “one original bill of lading must be surrendered duly endorsed in exchange for the goods or delivery order,” our view is that endorsement in blank was not a possibility here. The printed requirement on the bill of lading was however compiled with by the special endorsement from Barclays Bank D.C.O. to Intercotra Ltd. Moreover even if endorsement in blank had been possible it is a further requirement to succeed that the plaintiff must have been a holder and on the evidence he never held the original bill of lading. Be that as it may, the important thing is that the name of the plaintiff never appeared in the bill of lading (save in regard to notification which in this respect is irrelevant) and we cannot agree with Mr. Adefala’s contention that it is possible for someone here to be an endorsee whose name never appeared on the bill of lading (exhibit 4) as such. Endorsement of itself naturally purports writing, here upon the bill of lading. The question therefore of who had the property is not relevant to the plaintiff’s suit based upon the bill of lading (exhibit 4). The plaintiff was in no way a party to the contract of carriage of goods, but he was a party, if at all, to a separate contract with the sellers and the argument of his counsel has confused the two. In so far as the bill of lading was concerned, therefore the plaintiff had no locus standi to sue upon it. This being so, we think the learned trial judge was quite right to find that the plaintiff had no claim accruing to him by virtue of the bill of lading. Mr. Adefala conceded that if we are against him on this point, as we have now indicated that we are, then the appeal failed, but as other grounds were argued we will deal with them briefly.

On his second ground, namely:-

“2. The learned trial judge erred in law in holding that the defendants’ Hoegh Aurore” did not deviate from the contractual route of carriage by failing to discharge the goods at Lagos Customs Wharf before proceeding to Port-Harcourt;’

Mr. Adefala argued that accepting the finding that the goods could have been discharged at Lagos Customs Wharf on the 5th of April, 1965 it was still the duty of the defendant shipping company so to do under the terms of the contract of carriage even though not so instructed by the consignees Barclays Bank D.C.O. Indeed, far from so instructing, Barclays Bank D.C.O. in fact instructed the defendant shipping company not to unload, as having not found the plaintiff they were not willing themselves to take responsibility for the goods. The fact that there was evidence that the Nigerian Ports Authority was willing to accept the goods, to which Mr. Adefala drew our attention, does not take proper account of what was so intended in the context. The Nigerian Ports Authority would accept delivery, if so asked but there was separate evidence that they would not accept unless someone first undertook to accept responsibility for the goods when so delivered and no one had done so here. In our view the defendant shipping company was under no obligation to unload on the 6th of April, 1965 in Lagos once Barclays Bank D.C.O. the consignees, informed them not to do so, so that the ship’s subsequent departure for Port Harcourt was no “deviation” from the contract, as Mr. Adefala alleged.

On the 3rd ground namely:-

“3. The learned trial judge erred in fact and in law in holding that the defendant was not negligent in carrying out the Contract of Carriage.”

counsel for the appellant argued that potatoes should not have been put into cold stowage, but this court pointed out to him that the defendant shipping company was only acting in accordance with the direction of the sellers in the bill of lading (exhibit 4) in so storing them so that the shipping company could not act against the express instruction of the sellers who were shipping the goods. Counsel then argued that it was negligent to discharge the goods from cold storage into an open lighter where they were likely speedily to go bad, but as the tort of negligence, as opposed to breach of contract was never pleaded we did not allow him to argue further in this regard, especially as in any case the discharge into the lighter had been on the direction of Barclays Bank D.C.O. (the consignees) and Intercotra Ltd. (the endorsees) took delivery on the instructions of the shippers and found the potatoes in good condition.

Finally there was argument on the general ground of appeal that the decision was unreasonable having regard to the evidence but as there was no substance in the argument we do not propose to deal with it.

The appeal is accordingly dismissed with 39 guineas costs to the respondents. Appeal Dismissed.