**Babulal Narshi & Co Ltd v Deutsche Ost-Afrika-Linie**

**Division:** High Court of Kenya at Mombasa; Court of appeal at Mombasa

**Date of judgment:** 27 July 1974

**Case Number:** 168/1974 (118/74); 54/1974 (52/75)

**Before:** Sir Dermot Sheridan J, Spry Ag P, Law Ag V-P and Musoke JA

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*[1] Shipping – Bill of lading – Clean bill – Carrier not estopped from alleging improper packing.*

*[2] Shipping – Bill of lading – Improper packing – Can only be relied on when loss or damage results*

*from improper packing.*

**JUDGMENT**

**Sir Dermot Sheridan J:** The plaintiff sues the defendant as endorsee of a bill of lading issued at Amsterdam on 15 April 1971, covering “54 cartons, printed nylon” which were shipped on the defendant’s vessel *Tabora* for Mombasa.

On the face of it the bill states:

*“Shipped by the Shipper above named in apparent good order and condition, unless otherwise stated in this*

*Bill of Lading and only so far as the external appearance of the packages, cases, bales, wrappers and covers is concerned, on board the above Ocean Vessel (or on board the above Local Vessel, if named above, for forwarding subject to clause 25 on the reverse side of this Bill of Lading) the goods or packages said to contain goods above mentioned, for carriage form the above named Port of Loading, (or other port or place determined by the Carrier under the said clause 25) by the above Ocean Vessel (or Vessel substituted under the said clause 25) on a voyage as described and agreed by clauses 5,6 and 17 of this Bill of Lading and discharged, such carriage and discharge being always subject to the terms, conditions and exceptions hereinafter agreed, in like good order and condition at the Port of Discharge.”*

The plaint goes on to allege:

*“5. In the premises it was the duty of the defendant or the defendants, by the said bill of lading expressly or impliedly contracted to deliver the said goods in the same good order and condition as they were in when shipped.*

*6. F urther or alternatively the said bill of lading was expressly made subject to legislation based on The Hague Rules and the Rules comprised in the Schedule thereto. The said Rules provided (inter alia) as follows:*

*ARTICLE III, RULE 2*

*‘Subject to the provisions of Article 4, the carrier shall properly and carefully load handle, stow, carry, keep, care for and discharge the goods carried.’*

*7. I n breach of the duties referred to in paragraphs 5 and 6 hereof the defendant failed to deliver the said goods in the same good order and condition as they were in when shipped and delivered the same short by 6,955 as follows*:

*Carton No. Yards short.*

*6 745*

*8 720*

*9 1,020*

*11 990*

*12 960*

*14 720*

*16 700*

*46 1,080*

*8. I n the premises the plaintiff has suffered loss or damage amounting to Shs. 15,022/80 being the c.i.f. value of the said goods found short.”*

*Para. 4 of the defence, which was filed on 18 July 1972, alleges:*

*“4. In answer to paragraphs five and six of the plaint, the defendant states that the Hague Rules provide that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from inter alia insufficiency of packing.”*

*On 20 July 1972 a reply to the defence was filed which alleges:*

*“2. With reference to the contents of paragraph 4 of the defence the plaintiff particularly denies that there was any insufficiency of packing as alleged or at all or that any such insufficiency of packing (which is denied) occasioned or caused the loss in respect of which this suit is filed. Further and in the alternative the plaintiff avers that having issued a clean bill of lading in respect of the said 54 cartons without any endorsement thereon relating to the alleged insufficiency of packing, the defendant is estopped from relying on Article 4, Rule 2 (n) of the Hague Rules as against the plaintiff who is a bona fide transferee for value of the said bill of lading.”*

*By the Paramount Clause 1 of the bill, the Hague Rules are made applicable. The rules relating to bills of lading are set out in the Schedule to the Carriage of Goods by Sea Act (Cap. 392). Article IV provides for*

*Rights and Immunities and the relevant rule under it is:*

*“2. Neither the carrier or the ship shall be responsible for loss or damage arising or resulting from (n) of insufficiency of packing.”*

At the hearing on 4 July 1974, the only evidence called was that of Nathoo Meghji Shah, a director of the plaintiff company, who testified how the plaintiff bought the goods as per the bill through Nimmo General Agencies Ltd. in Nairobi who have an open import licence. On 19 June 1971 he received an examination voucher from East African Harbours stating that the goods had arrived in a damaged condition. When he examined the cartons he found that 8 of them had been broken into apparently during the voyage and materials were missing as per paras. 7 and 8 of the plaint.

After the close of the plaintiff’s case, Mr. M. Satchu for the defendant, applied to amend the defence by adding the following para. 4A:

*“4A. that the goods were packed in cartons, and that the goods were deemed to be insufficiently packed, if so packed, and that the defendant was not to be responsible in the event of loss or damage to such goods in terms of clause 23 of the bill of lading.”*

Although objection was taken to this late application to amend the defence, this was not persisted in at the resumed hearing on 18 July. Clause 23 of the bill provides:

*“23. PACKING OF GOODS: The carrier specifically reserves to himself all rights and immunities to which he is entitled by Article 4, Section 2 of the Hague Rules, Section 608 H.G.B., or article 91, para. 42 of the Belgian Law, and other similar legislation where goods have been unpacked or packed in bales or trusses which are not cross hooped or in single hessian, jute or cotton bags: or in secondhand packages or other containers previously used: or goods packed in cartons, paper or cardboard containers: or any other insubstantial packaging whatsoever which needs a standard degree of care usually unobtainable with normal labour irrespective of whether such packaging is or is not customary in that particular trade and irrespective of whether the goods have been described herein as being in apparent good order and condition and all other defences available under Article 4, Section 2.”*

The defence elected not to call evidence. Mr. Inamdar, for the plaintiff, then made his submissions. He relied heavily on *Silver v. Ocean Steamship Co*., [1930] 1 K.B. 416, the headnote of which reads:

*“The incorporation of the provisions of the Carriage of Goods by Sea Act, 1924, in a bill of lading stating that the goods have been ‘shipped in apparent good order and condition’ does not affect the obligation of the shipowner to deliver the goods in the like good order and condition unless he can prove facts bringing him within an exception excluding his liability, or can show that damage has been occasioned through some cause which was not apparent on a reasonable examination of the goods when shipped. A shipowner who signs a bill of lading for goods ‘shipped in apparent good order and condition’ is estopped as against the holder of the bill of lading from alleging that the goods, in respect of matters externally visible on a reasonable examination, were not in good condition when shipped; and (per Scrutton and Slesser, L.JJ.) is further estopped from alleging that by reason of the particular nature and shape of the containers in which the goods are placed damage to the goods has been caused by ‘insufficiency of packing’ within Art. IV., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, where the nature and shape of the containers were apparent on the shipment of the goods.*

Query, per Greer, L.J., whether the statement in a bill of lading that goods have been ‘shipped in apparent good order and condition’ has any reference to original defects of quality or type.

The fact that the holder of a bill of lading containing the statement that the goods were *‘shipped in apparent good order and condition’ takes it without objection as a clean bill of lading is sufficient evidence that he relied upon it.”*

In the instant case there was no evidence that the cartons were shipped in a damaged condition. If they had been, the defendant shipowner should have made an endorsement on the bill that the goods had been insufficiently packed. The plaintiff as transferee for value bought the goods on the document subsequent to shipment and it has to rely on it. Per Scrutton, L.J. at p. 425:

“The second point of law is this. It has been decided by Channel, J. in *Compania Naviera Vasconzada v.*

*Churchill & Sim* (3) and affirmed by the Court of Appeal in *Brandt v. Liverpool, Brazil and River Plate*

*Steam Navigation Co*. (4), that the statement as to ‘apparent good order and condition’ estops (as against the person taking the bill of lading for value or presenting it to get delivery of the goods) the shipowner from proving that the goods were not in apparent good order and condition when shipped and therefore from alleging that there were at shipment external defects in them which were apparent to reasonable inspection.

Art. III., r. 4 of the Carriage of Goods Act, 1924, which says the bill shall be *prima facie* evidence (not *prima facie* evidence *only*, liable to be contradicted), can hardly have been meant to render the above decisionsinapplicable. For the information relates to the shipowner’s knowledge; he is to say what is ‘apparent’ that is, visible by reasonable inspection to himself and his servants, and on the faith of that statement other people are to act, and if it is wrong, act to their prejudice.

I am of opinion that r. 4 of Art. III, has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition on shipment were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it.

Apparent good order and condition was defined by Sir R. Phillimore in *The Peter der Grosse* (1) as meaning that ‘apparently, and so far as met the eye, and externally, they were placed in good order on board this ship’.

If so, on the *Churchill & Sim* decision (2), the shipowner is not allowed to reduce his liability by proving or suggesting contrary to his statement in the bill that the goods in respect of matters externally reasonably visible were not in good condition when shipped.”

The cartons were received in apparent good order and condition and by issuing a clean bill of lading the defendant is in the absence of evidence to the contrary, estopped from denying this. Mr. Inamdar contends that the mere fact that the goods are packed in cartons does not of itself render them insufficiently packed. His answers to para. 4A of the amended defence are:

(1) *Unless the bill expressly and categorically states that the goods are badly or insufficiently packed, it is a clean bill of lading. In Sasson: British Shipping Laws, Vol. V, p. 24, a clean bill of lading is stated to be “one which bears no superimposed clauses expressly declaring a defective condition of the goods or packaging”. A clause which does not expressly state that the goods or packaging are unsatisfactory, e.g. “second-hand cases”, does not convert a clean into an unclean bill of lading. There is nothing in clause 23 which expressly states that the packaging is insufficient.*

*(2) Clause 23, when properly analysed, does not bear meaning ascribed to it in the defence; nor does it have the effect of rendering carton-packed goods to be insufficiently packed.*

Restricting oneself to cartons it says that where goods are packed in cartons the carrier reserves to himself all rights to which he is entitled under the various provisions of law referred to irrespective of whether the goods are described in the bill as being in good order and condition. So paraphrased, there is no suggestion in clause 23 that if goods are packed in cartons they must not be deemed ipso facto to be insufficiently packed.

Before Article IV, rule 2 (*n*) can be relied on by the carrier:

(*a*) There must be evidence that carton-packing amounts to insufficient packing and

(*b*) He must establish that the loss or damage complained of arose out of or resulted from insufficiency of packing. The onus is on the defendant to bring himself within the scope of the exception:

*Carver: Carriage by Sea*, 12th Edn., Vol. 1, p. 132. The defendant has not attempted to do so;

(3) even if clause 23 means that the mere fact of packing in cartons amounts to insufficient packing then it is rendered null and void by Article III, r. 8 which provides:

“Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.”

In *British Imex Industries v. Midland Bank*, [1958] 1 All E.R. 264, it was held that a clause stipulating that the carrier should not be responsible for delivery unless the goods were marked in a particular manner (e.g. by oil paint) went further in lessening the carriers liability Article IV, r. 2 (*n*) and (*o*) and to that extent was void.

Mr. Satchu’s reply is that the defendant does not have to prove that the goods are insufficiently packed as the parties have agreed by clause 23 which is one of the conditions of the bill that they are. The bill is a contractual document which must be read as a whole with Article IV, r. 2 (*n*) and the plaintiff as assignee takes it subject to all its rights and liabilities. Mr. Satchu distinguishes *Silver’s* case where there was no similar clause 23. There was a clean bill of lading and no defect in the goods was apparent on shipment. The words “shipped in apparent good order and condition” are not contractual but they contain a representation of fact which may create an estoppel in favour of a purchaser relying on the words in the bill of lading and acting on them to his detriment: per Greer, L.J. in *Silver’s* case at p. 432. See also *The Skarp*, [1935] All E.R. Rep. 560. Here the defendant is relying on the words of the contract. In *Gould v. South Eastern & Chatham Railway Co*., [1920] 2 K.B. 186, it was held that where goods are delivered to a common carrier for carriage insufficiently packed, and are damaged in the course of transit, the carrier’s knowledge of their condition at the time of their receipt will not preclude him from setting up as a defence that the damage was due to insufficient packing.

In *Silver’s* case, Slessor, L.J. at p. 441 distinguished *Gould’s* case when he said that the clean bill of lading, once the defect in packing is apparent, took it out of the ambit of that case. The question remains was the bill a clean bill?

The case most favourable to Mr. Satchu’s submission is *Canada & Dominion Sugar Co. v. Canadian*

*National* (*West Indies*) *Steamships* 80 LI. L. Rep. 13 where it was held:

*“that the statement in the bill of lading that the goods had been ‘received in apparent good order and condition’ was clearly qualified by the marginal indorsement that it had been ‘signed under guarantee to produce ship’s clean receipt,’ and that therefore the shipowners were not estopped from adducing evidence that the goods were damaged before shipment; that it was accordingly unnecessary to consider the effect of Clause 27; and that there being no demand for bill of lading by the shipper Art. III (3) of the Ordinance of British Guiana did not apply.”*

But there the endorsement was stamped on the face of the bill and per Lord Wright at p. 15:

“That was a stamped clause clear and obvious on the face of the document and reasonably conveying to any business man that if the ship’s receipt was not clean the statement in the bill of lading as to the apparent order and condition could not be taken to be unqualified. If the ship’s receipt was not clean the bill of lading would not be a clean bill of lading with the result that the estoppel which would have been set up by the indorsee as against the shipowner of the bill of lading had been a clean bill of lading and the necessary conditions of estoppel had been satisfied, could not have been relied on.”

To my mind that is a far cry from the small print of clause 23 tucked away on the back of the bill. It follows that the bill is a clean bill of lading and the defendant is estopped.

Further in the circumstances of this case I do not think that the defendant can rely as a matter of law on the exception in Article IV, r. 2 (*n*) without adducing evidence that the loss or damage to the plaintiff’s goods arose or resulted from insufficiency of packing. This means that I accept Mr. Inamdar’s construction of clause 23. There will be judgment for the plaintiff as prayed.

*Order accordingly.*

For the plaintiff:

*KK Chohan* (instructed by *Bryson, Inamdar & Bowyer*, Mombasa)

For the defendant:

*M Satchu* (instructed by *Atkinson, Cleasby & Satchu*, Mombasa)